DOCKET

No. 07-984
Vide 07-990
Title: Coeur Alaska, Inc., Petitioner
v.
Southeast Alaska Conservation Council, et al.
Docketed: January 29, 2008
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-35679)
Decision Date: May 22, 2007
Rehearing Denied: October 29, 2007
Questions Presented

---Date---	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 28 2008	Petition for a writ of certiorari filed. (Response due February 28, 2008)
Feb 11 2008	Brief of respondent Goldbelt, Inc. in support filed. VIDED.
Feb 21 2008	Letter of February 19, 2008, from counsel for respondent Alaska received.
Feb 25 2008	Order extending time to file response to petition to and including March 31, 2008, for all respondents.
Feb 28 2008	Brief amici curiae of National Mining Association, et al. filed.
Feb 28 2008	Brief amicus curiae of Mountain States Legal Foundation filed.
Mar 26 2008	Order further extending time to file response to petition to and including April 30, 2008, for all respondents.
Apr 25 2008	Order further extending time to file response to petition to and including May 14, 2008, for all respondents.
May 14 2008	Brief of Federal Respondents in opposition filed. VIDED.
May 14 2008	Brief of respondent Southeast Alaska Conservation Council, et al. in opposition filed. VIDED.
May 27 2008	DISTRIBUTED for Conference of June 12, 2008.
May 27 2008	Reply of petitioner Coeur Alaska, Inc. filed. (Distributed)
May 28 2008	Letter and attachment dated May 27, 2008, proposing a lodging, received from counsel for the petitioner. (Distributed).
Jun 16 2008	DISTRIBUTED for Conference of June 19, 2008.
Jun 23 2008	DISTRIBUTED for Conference of June 26, 2008.
Jun 27 2008	Petition GRANTED The case is consolidated with No. 07-990, and a total of one hour is allotted for oral argument.
Jul 15 2008	The time within which to file the joint appendix and petitioners' briefs on the merits is extended to and including September 2, 2008. VIDED.
Jul 15 2008	The time within which to file respondents' briefs on the merits is extended to and including October 23, 2008. VIDED.
Aug 13 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner Alaska. VIDED.
Aug 13 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondent Goldbelt, Inc. VIDED.
Aug 13 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondents Southeast Alaska Conservation, Sierra Club, and Lynn

	Canal Conservation. VIDED.
Aug 14 2008	The time within which to file the joint appendix and petitioners' briefs on the merits is further extended to and including September 17, 2008. VIDED.
Aug 14 2008	The time within which to file respondents' briefs on the merits is further extended to and including November 7, 2008. VIDED.
Aug 19 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner Coeur Alaska. VIDED
Sep 17 2008	Brief of petitioner Alaska filed. VIDED.
Sep 17 2008	Brief of respondents United States Army Corps of Engineers, et al. in support of petitioners filed. VIDED.
Sep 17 2008	Brief of petitioner Coeur Alaska, Inc. filed. VIDED.
Sep 17 2008	Brief of respondent Goldbelt, Inc. in support of petitioners filed. VIDED.
Sep 17 2008	Joint appendix filed (2 volumes). Statement of costs received. VIDED.
Sep 24 2008	Brief amici curiae of National Mining Association, et al. filed. VIDED.
Sep 24 2008	Brief amicus curiae of National Association of Home Builders filed. VIDED.
Sep 24 2008	Brief amicus curiae of Council of Alaska Producers filed. VIDED.
Sep 24 2008	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED.
Sep 24 2008	Brief amicus curiae of Mountain States Legal Foundation filed. VIDED.
Sep 24 2008	Brief amicus curiae of Resource Development Council for Alaska, Inc. filed. VIDED.
Oct 7 2008	SET FOR ARGUMENT ON Monday, January 12, 2009
Nov 4 2008	CIRC LATED.
Nov 7 2008	Brief of respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation filed. VIDED. (Distributed)
Nov 14 2008	Brief amici curiae of David M. Chambers, Catherine Coumans, and Carol Ann Woody filed. VIDED. (Distributed).
Nov 14 2008	Brief amici curiae of American Rivers, et al. filed. VIDED. (Circulated)
Nov 14 2008	Brief amicus curiae of Honorable G. Tracy Mehan,III filed. VIDED.(Circulated)
Nov 14 2008	Brief amici curiae of Members of Congress filed. VIDED. (Circulated)
Nov 14 2008	Brief amici curiae of Nondalton Tribal Council, et al. filed. VIDED. (Distributed)
Nov 14 2008	Motion of the Solicitor General for divided argument VIDED.
Nov 28 2008	Record received from the U.S.C.A. for the 9th Circuit. (1 box)
Nov 28 2008	Record received from the Chambers of Honorable Judge Procter Hug, Jr. (U.S.C.A. for 9th Circuit) for the U.S.D.C. for the District of Alaska. (1 e lope)
Dec 1 2008	Motion for divided argument filed by the Solicitor General GRANTED. VIDED.
Dec 8 2008	Reply of Federal Respondents supporting petitioners filed. VIDED. (Distributed)
Dec 8 2008	Reply of petitioner Coeur Alaska, Inc. filed. VIDED. (Distributed)
Dec 8 2008	Reply of respondent Goldbelt, Inc. supporting petitioners filed. VIDED. (Distributed)
Dec 8 2008	Reply of petitioner Alaska filed. VIDED. (Distributed)
Jan 12 2009	Argued. For federal respondents in support of petitioners: Gregory G. Garre, Solicitor General, Department of Justice, Washington, D.C. For petitioners: Theodore B. Olson, Washington, D.C. For respondents: Thomas S. Waldo, Juneau, Alaska.

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act provides two separate programs for the permitting of discharges into navigable waters of the United States. Under Section 404 of the Act, the Army Corps of Engineers may issue permits for discharges of "fill material," subject to the water-quality restrictions imposed by Section 404(b)(1). Under Section 402 of the Act, the Environmental Protection Agency may issue permits for the discharge of all other pollutants, subject to the effluent limitations prescribed under Sections 301 and 306 of the Act.

In 2002, after notice and comment, the EPA and the Corps jointly promulgated a regulation defining the statutory term "discharge of fill material" to include "tailings or similar mining-related materials." Pursuant to its authority under Section 404 to grant permits for the discharge of "fill material," the Corps granted petitioner a permit to deposit certain mine tailings in a lake.

In the decision below, the Ninth Circuit invalidated that permit even though it acknowledged that the proposed discharge "facially meets the current regulatory definition of 'fill material.'" Upsetting 35 years of established agency practice, the court of appeals held that the Corps may not issue a Section 404 permit for the discharge of fill material if the fill material in question otherwise would be subject to a Section 301 or 306 effluent limitation.

The question presented is whether the Ninth Circuit erred in reallocating the Corps' and EPA's permitting authority under the Act.

PARTIES TO THE PROCEEDING

In addition to Southeast Alaska Conservation Council, the Sierra Club and Lynn Canal Conservation were appellants in the court of appeals. In addition to Coeur Alaska, Inc., the following parties (or their predecessors in office, *see* this Court's Rule 35.3) were appellees in the court of appeals and are respondents in this Court pursuant to this Court's Rule 12.6: the United States Army Corps of Engineers; Kevin J. Wilson, in his official capacity as District Engineer; Michael Rabbe, in his official capacity as Chief of the Regulatory Branch; George S. Dunlop, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); the United States Forest Service; the State of Alaska; and Goldbelt, Inc.[1]

Pursuant to this Court's Rule 29.6, undersigned counsel state that Coeur d'Alene Mines Corporation is the parent company of Coeur Alaska, Inc. and that no other publicly held company owns 10% or more of its stock. Coeur d'Alene Mines Corporation has no parent company and no publicly held company owns 10% or more of its stock.

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[1] Kevin J. Wilson replaced Timothy J. Gallagher as District Engineer, Michael Rabbe replaced Larry L. Reeder as Chief of the Regulatory Branch, and George S. Dunlop replaced Dominic Izzo as Principal Deputy Assistant Secretary of the Army (Civil Works).

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 11

I. THE BROAD RAMIFICATIONS OF THE NINTH CIRCUIT'S DECISION MARK THIS CASE AS ONE OF EXCEPTIONAL IMPORTANCE 13

A. The Ninth Circuit's Decision Radically Alters The Longstanding Structure Of The Clean Water Act's Discharge Permit Programs 13

B. The Ninth Circuit's Decision Will Severely Harm the Nation's Mining Industry 16

C. The Ninth Circuit's Decision Threatens To Disrupt The Economies Of Alaska And Other Western States 19

II. THE NINTH CIRCUIT'S CONSTRUCTION OF THE CLEAN WATER ACT CONTRAVENES THE ACT'S TEXT AND STRUCTURE, DECISIONS OF THIS COURT, AND DECISIONS OF OTHER COURTS OF APPEALS 21

III. THE NINTH CIRCUIT'S REFUSAL TO DEFER TO CORPS' INTERPRETATION OF ITS OWN REGULATION CONFLICTS WITH THIS COURT'S PRECEDENTS 27

CONCLUSION 31

TABLE OF CONTENTS—Continued

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit 1a

APPENDIX B: Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc 37a

APPENDIX C: Opinion of the United States District Court for the District of Alaska..... 39a

APPENDIX D: Order of the United States Court of Appeals for the Ninth Circuit Granting Injunction Pending Appeal 58a

APPENDIX E: Order of the United States Court of Appeals for the Ninth Circuit Denying Motion to Vacate the Injunction Pending Appeal 60a

APPENDIX F: Order of the United States Court of Appeals for the Ninth Circuit Staying the Mandate 66a

APPENDIX G: Order of the United States Court of Appeals for the Ninth Circuit Directing Preparation of Reclamation Plan..... 67a

APPENDIX H: Relevant Provisions of the Clean Water Act 69a

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins, 519 U.S. 452 (1997) 28

Bates v. United States, 522 U.S. 23 (1997).....25

Bragg v. W. Va. Coal Ass'n,
248 F.3d 275 (4th Cir. 2002).....16

Chevron U.S.A. Inc. v. Echazabal,
536 U.S. 73 (2002).....29

Chevron U.S.A. Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984).....31

Friends of Crystal River v. U.S. E.P.A.,
35 F.3d 1073 (6th Cir. 1994).....23

Greenfield Mills, Inc. v. Macklin,
361 F.3d 934 (7th Cir. 2004).....22

HCSC-Laundry v. United States,
450 U.S. 1 (1981).....26

Kentuckians for the Commonwealth, Inc. v. Rivenburgh,
317 F.3d 425 (4th Cir. 2003).....2, 23, 29, 30

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992).....26

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
127 S. Ct. 2518 (2007).....29

TABLE OF AUTHORITIES—Continued

Page(s)

Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) 26

Officemax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005) 22

Purcell v. Gonzalez, 127 S. Ct. 5 (2006) 10

Rapanos v. United States, 126 S. Ct. 2208 (2006) 21, 22

S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) 21, 25

Slodov v. United States, 436 U.S. 238 (1978) 22

State of Minn. by Spannaus v. Hoffman, 543 F.2d 1198 (8th Cir. 1976) 23

Townsend v. Little, 109 U.S. 504 (1883) 26

United States v. Fisk, 70 U.S. 445 (1866) 22

United States v. Locke, 471 U.S. 84 (1985) 28

Statutes

5 U.S.C. § 706 8

33 U.S.C. § 1251 13

33 U.S.C. § 1311 ..... 3, 4, 21

33 U.S.C. § 1316 5

33 U.S.C. § 1319 19

33 U.S.C. § 1342 ..... passim

33 U.S.C. § 1344 ..... passim

TABLE OF AUTHORITIES—Continued

Page(s)

33 U.S.C. § 1365 19

Regulations

33 C.F.R. § 323.2 ..... passim

40 C.F.R. § 232.2 ..... passim

40 C.F.R. § 440.104 9

40 C.F.R. § 440.12 14

Other Authorities

Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292 (Apr. 20, 2000) 3, 4, 14

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (May 9, 2002) 22, 27

Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092 (Mar. 12, 2007) 17

U.S. Army Corps of Engineers, Regulatory Program Mission Statement 29

U.S. Geological Survey, Mineral Commodity Summaries 2007 ..... 17, 18

U.S.G.S., 2005 Minerals Yearbook, Statistical Summary (Aug. 2007) 19

PETITION FOR A WRIT OF CERTIORARI

Petitioner Coeur Alaska, Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 486 F.3d 638. App., *infra*, 1a. The order denying the petition for rehearing en banc is unreported. *Id.* 36a. The opinion of the United States District Court for the District of Alaska is also unreported. *Id.* 38a.

JURISDICTION

The district court had jurisdiction over respondent's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on May 22, 2007, and it denied, on October 29, 2007, petitioner's timely filed petition for rehearing en banc. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Clean Water Act, 33 U.S.C. §§ 1257–1387, are set forth in the Appendix, *infra*, at 68a.

STATEMENT

This case presents a question of exceptional importance to the administration of the Clean Water Act. Since the Clean Water Act's enactment in 1972, both the Environmental Protection Agency and the Army Corps of Engineers have consistently recognized that the Clean Water Act treats discharges of "fill material" differently from discharges of other

pollutants: Discharges of "fill material" are subject to regulation under Section 404 of the Clean Water Act (33 U.S.C. § 1344) and to effluent guidelines promulgated under Section 404(b)(1), while discharges of other pollutants are subject to regulation under Section 402 (33 U.S.C. § 1342) and the different effluent limitations (including standards of performance) that Section 402 specifies. Rejecting this well-settled statutory dichotomy and enforcement protocol developed by the specialized agencies responsible for administering the Act, by numerous courts, by state governments, and by the mining industry, the Ninth Circuit imposed a novel and conflicting requirement. In the Ninth Circuit, discharges of "fill material" must now comply with effluent limitations not only under Section 404, but also those specified for "other pollutants" by Section 402. This decision overturns the settled understanding of the Act and the enforcement regime developed over the course of 35 years by EPA and the Corps through their joint administration of the Clean Water Act, disregards the two-part statutory scheme Congress enacted, significantly impacts the mining industry by prohibiting a common practice often necessary for hard rock and other mining (including mining for gold, silver, copper, lead, zinc, phosphate, and molybdenum ores), and jeopardizes the economies (and therefore the people) of States dependent on mining.

1. Prior to the decision below, the Clean Water Act's bifurcated permitting scheme was well established. *See, e.g.*, *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003) (explaining how the Act's structure "reinforc[es] the fill-effluent distinction that has been followed by the agencies"). Section 301 of the Act broadly prohibits

the discharge of pollutants into navigable waters of the United States "[e]xcept as in compliance" with permit programs established by the Act. 33 U.S.C. § 1311(a). The Clean Water Act makes clear that the Section 404 and Section 402 permitting schemes are mutually exclusive: It entrusts to the Corps of Engineers the authority to issue permits "for the discharge of . . . fill material into the navigable waters," 33 U.S.C. § 1344, while the authority to issue permits for all pollutants other than "fill material" rests with EPA, *id.* § 1342 ("*Except as provided in section* [] . . . *1344* . . ., the [EPA] Administrator may . . . issue a permit for the discharge of any pollutant . . . .") (emphasis added). Indeed, below, even the appellants agreed that "[t]he Act provides that a single discharge will be governed by either section 402 or section 404, but not both." Appellants' C.A. Br. 24.

This bifurcation makes sense, as the appellants below also acknowledged: "The dual permitting structure of sections 402 and 404 reflects Congress's view that discharges of . . . fill material did not pose the same threats to water quality as discharges of industrial and municipal wastes." Appellants' Emergency Mot. under Cir. R. 27-3, at 6. As EPA and the Corps have explained, "[i]n keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, sections 404 and 402 employ different approaches to regulating the discharges to which they apply." Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,293 (Apr. 20, 2000). "The section 402 program is focused on . . . discharges such as wastewater discharges from industrial operations and sewage treatment plants, stormwater and the like." *Id.* "Fill

material," on the other hand, "differs fundamentally from the types of pollutants covered by section 402 because the principal concern is the loss of a portion of the water body itself." *Id.*; *see also id.* (noting that Section 404(b)(1) guidelines "provide for consideration of the effects of chemical contaminants on water quality in a number of ways" but also "go beyond such a water quality based approach to require numerous additional considerations" including "effects of the discharge on the aquatic ecosystem as a whole," such as loss of wetlands); 33 U.S.C. § 1343(c) (setting out criteria, cross-referenced by Section 404(b)(1), that consider, among other things, effects on "economic values" and "mineral exploitation").

Discharges of "fill material" governed by Section 404 must satisfy guidelines (known as Section 404(b)(1) guidelines) jointly developed by EPA and the Corps. Section 404 does not require compliance with effluent limitations promulgated by EPA; in fact, Section 404(p) provides that "[c]ompliance with a permit issued pursuant to [Section 404] . . . shall be deemed compliance . . . with [Section 301]." 33 U.S.C. § 1344(p). Section 404(c), moreover, provides an additional protection for water quality by stating that EPA may veto any permit the Corps proposes to grant.

In contrast, discharges that fall under Section 402—also known as the National Pollution Discharge Elimination System ("NPDES") program—must meet "all applicable requirements" under Sections 301 and 306 of the Clean Water Act. 33 U.S.C. § 1342(a). Section 301 requires compliance with "[e]ffluent limitations" applicable to existing point sources, *id.* § 1311(e), while Section 306 applies more stringent effluent limitations, known as "standards of per-

formance," to new point sources, *id.* § 1316(e). *See* App., *infra*, 13a n.8 ("A standard of performance is one type of effluent limitation."). These effluent limitations are promulgated in the form of regulations issued by EPA.

Because the term "fill material" is not defined by the Clean Water Act, these agencies, acting on the discretion delegated to them by Congress, issued a joint regulation to delineate which discharges would be regulated under Section 404 of the Clean Water Act and which would fall under Section 402. In their joint regulation, the agencies clearly defined "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii); 40 C.F.R. § 232.2. Additionally, the agencies provided that the term "discharge of fill material" "generally includes . . . placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.

The discharge at issue in this case is the placement of mine tailings, transported in a slurry form, into Lower Slate Lake in southeastern Alaska, where, all agree, the tailings would "raise the bottom elevation of the lake by 50 feet." App., *infra*, 3a.

2. Nearly twenty years have passed since petitioner Coeur Alaska first proposed revitalizing the historic Kensington gold mine, located about 45 miles north of Juneau, Alaska, and initiated the process of obtaining the requisite permits from the U.S. Forest Service, EPA, the Corps, and other agen-

cies. C.A. E.R. 6.[1] Over the next 15 years, the Kensington project underwent extensive environmental analysis, encompassing several different proposed methods of operations. More than 900 studies, costing over $26 million, examined the project's environmental impact; numerous federal and state agencies, including the Forest Service, the Corps, EPA, the Alaska Department of Environmental Conservation ("DEC"), the Alaska Department of Natural Resources, the National Marine Fisheries Service, and the U.S. Fish and Wildlife Service, reviewed its proposals and their expected effects. *See, e.g.*, C.A. E.R. 397.

Coeur Alaska's plan of operations provides for milling ore on-site through a conventional "froth-flotation" process that separates valuable ore from the remaining minerals. Over the 10- to 15-year life of the project, the mill processing operations will yield a great deal of valuable ore, but also several million tons of mine tailings. Only forty percent of the tailings can be stored in the mine. App., *infra*, 4a. Because depositing the excess tailings on land in this rainy, steep area of Alaska would require destructive conversion of more than 100 acres of wetlands to uplands (C.A. J.S.E.R. 401–02) and would raise other environmental, energy, safety, economic, and technical issues, Coeur Alaska sought a permit to dispose of the remainder—up to 4.5 million tons—by placing them into a carefully designed impoundment in Lower Slate Lake. The Corps carefully con-

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[1] "C.A. E.R." refers to the Excerpts of Record filed in the court of appeals. "C.A. J.S.E.R." refers to the Joint Supplemental Excerpts of Record also filed in the court of appeals.

sidered these alternatives in its Record of Decision, *id.* 555–71, and ultimately concluded that upland disposal would be "more damaging" than deposition in Lower Slate Lake because upland disposal would cause a "permanent loss of wetland[s]" that would "outweigh[] the temporary losses to the lake." C.A. J.S.E.R. 872.[2]

Because Coeur's largely solid mine tailings constitute "fill material" (the tailings indisputably would "[c]hang[e] the bottom elevation" of the lake, 33 C.F.R. § 323.2(e)(1)(ii)), Coeur sought a discharge permit from the Corps under Section 404. After reviewing the final proposal and the input of several other agencies (including a Record of Decision by the Forest Service), the Corps approved the proposal in June 2005 and granted Coeur Alaska a Section 404 permit, which incorporated numerous protective requirements under Section 404(b)(1) guidelines, to discharge tailings into Lower Slate Lake. C.A. E.R.. 522–33.

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[2] The tailings discharge is likely to result in the loss of some small fish and other aquatic life in the lake. App., *infra*, 44a–45a; *see also* C.A. J.S.E.R. 745, 755, 943–52, 959–62. This loss, however, is expected to result from the physical impact of the tailings, not from toxicity or poor water quality. App., *infra*, 43a (anticipating that aquatic life would be lost "primarily due to being covered with the discharged material"). By the time operations conclude, however, the settled tailings fill will have reduced the lake's depth from 51 feet to approximately 33 feet, and increased its surface area from 23 acres to more than 60 acres, thereby substantially improving the available fish habitat by providing more shallow, productive areas. C.A. E.R. 349. Coeur's plan of operation calls for it to reintroduce fish into the lake at the close of operations.

Originating from the mine ore processing mill, the tailings slurry unavoidably contains some process water potentially subject to Section 301 effluent limitations and Section 306 performance standards under the Section 402 program. Recognizing, however, the clear fill effect of the tailings discharge into the Lower Slate Lake impoundment, EPA concurred that Section 404 was the applicable permitting regime and that Section 301 and Section 306 limits did not apply. After reviewing multiple analyses and working with the Corps to resolve environmental concerns, EPA affirmed the permit by declining to exercise its ultimate veto authority under Section 402(c). EPA also issued a Section 402 permit, incorporating effluent limitations, to govern the subsequent discharge of water from the lake impoundment into the small adjacent creek leading to more substantial downstream waters. C.A. E.R. 412–14, 534–36, 542–43; C.A. J.S.E.R. 656, 662–664. Similarly, the Alaska DEC certified that the proposal would comply with Section 401 of the Clean Water Act and with Alaska's water-quality standards. C.A. J.S.E.R. 827–832.

3. Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") sued the Corps of Engineers and the Forest Service, arguing that the issuance of the permit violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), and Sections 301(a), 301(e), and 306(e) of the Clean Water Act. SEACC relied on an EPA regulation that stated "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores," 40 C.F.R. § 440.104(b)(1), arguing that this "no discharge" performance standard

(promulgated under Section 306) precluded the grant of a Section 404 permit.

SEACC also challenged, in the alternative, the agencies' interpretation of their own joint regulation, arguing that it was arbitrary and capricious to interpret the term "discharge of fill material"—a term which the joint regulation provides "includes . . . placement of . . . tailings or similar mining-related materials," 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2—to include mine tailings. C.A. E.R. 15 ¶ 72. SEACC did not challenge the regulation itself or contest the Section 404 permit's compliance with the Section 404(b)(1) guidelines.

After Coeur Alaska, the State of Alaska, and Goldbelt, Inc. intervened, the district court decided, on summary judgment, that "[t]he Corps properly issued the permit to Coeur Alaska, Inc. under § 404." App., *infra*, 55a. The district court recognized that the Clean Water Act "divides the permitting process into two segments" and that different standards applied under Sections 402 and 404, *id.* 51a; accordingly, the district court concluded that "[i]f the permit was properly issued under § 404, [Sections 301(e) and 306(e)] are inapplicable," *id.* 48a n.35. The district court also rejected SEACC's argument that statements in the regulatory history compelled the conclusion that the agencies' interpretation of their own rule—an interpretation that "facially falls within the definition of 'fill material' contained in the regulations," *id.* 53a—was unreasonable.

4. SEACC filed an emergency motion for an injunction pending appeal. A two-judge panel of the Ninth Circuit (Reinhardt, J., and Goodwin, J.) granted the injunction without providing any reasoning for its order. App., *infra*, 57a–58a. After Coeur

Alaska asked the Ninth Circuit to vacate the injunction pending appeal in light of this Court's decision in *Purcell v. Gonzalez*, 127 S. Ct. 5, 6–7 (2006) (vacating an injunction where "[t]he Court of Appeals offered no explanation or justification for its order" and "fail[ed] to provide any factual findings or indeed any reasoning of its own"), the merits panel denied the motion to vacate, while providing little additional explanation of the grounds for its decision. App., *infra*, 59a.

The Ninth Circuit eventually reversed the judgment of the district court and invalidated Coeur's Section 404 discharge permit. The court of appeals concluded that the Corps, by issuing a permit for a discharge that "facially meets the Corps' current regulatory definition of 'fill material,'" App., *infra*, 10a, and "facially qualif[ies] for permitting under § 404," *id.* 15a, had nevertheless "violated the Clean Water Act," *id.* 34a.[3]

The panel purported to base its conclusion on "the plain language of the Clean Water Act." App., *infra*, 10a. The panel reasoned that Section 301(a) "prohibits all discharges of any pollutant . . . except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404." *Id.* 11a–12a. Relying on Section's 301's "use of 'and' as a connector," the panel concluded that "§ 301(a) prohibits *any* discharge that does not comply with . . .

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[3] The Ninth Circuit also invalidated a separate Section 404 permit issued to Goldbelt Alaska Native Corporation for rock fill for a dock for the southern marine terminal for the Kensington mine project, solely because the dock was permitted for mine operations. App., *infra*, 35a.

both § 301 and § 306, as well as § 402 and § 404." *Id.* 15a. Thus, the panel concluded that "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." *Id.* 17a. "[T]he NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for [such] discharges." *Id.* 18a.

The panel also reached the alternative holding that, even though Coeur's proposed discharge "facially meet[s] the definition of the term 'fill material,'" App., *infra*, 22a, the "regulatory history" nonetheless demonstrated that the Corps had unreasonably interpreted its own regulation as encompassing Coeur's discharge. *Id.* 19a. The regulation's plain language notwithstanding, the panel concluded that the regulation must be interpreted to include only "those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance." *Id.* 30a–31a.

5. The court of appeals denied rehearing, App., *infra,* 37a, but, on Coeur's motion, stayed its mandate pending review by this Court. *Id.* 65a. After granting the stay, however, the court of appeals issued an order, on SEACC's motion, to require Coeur Alaska, the Corps, and the Forest Service to prepare and approve a reclamation plan by April 1, 2008. *Id.* 66a.

REASONS FOR GRANTING THE PETITION

The decision of the Ninth Circuit effectively rewrites the structure of the Clean Water Act: It changes the Section 404 permit program from a distinct permitting scheme that carves out an important exception to Section 402, *see* 33 U.S.C. § 1342(a)(1)

("Except as provided in section[] . . . 1344"), into a secondary permitting scheme that has only residual application.

Left undisturbed, the consequences of this decision will be extensive. It has the immediate impact of upsetting national uniformity in the administration of the Clean Water Act by reallocating (in the Ninth Circuit) the division of labor and expertise followed by EPA and the Corps for the past three decades. It imposes new requirements on mining in this country—much of which occurs under the jurisdiction of the Ninth Circuit—by threatening to restrict the industry's ability to conduct common types of ore processing. And it correspondingly weakens the economies of western States that rely significantly on mining.

The decision below also warrants review because it contravenes basic, firmly established principles of statutory interpretation consistently recognized in the decisions of this Court and of the courts of appeals. Moreover, by refusing to defer to the Corps' interpretation (in which EPA concurred) of the joint EPA-Corps regulation defining "fill material"—even as it acknowledged that the agencies' interpretation was consistent with the joint regulation's plain text—the Ninth Circuit set itself against a long line of this Court's decisions concerning the extraordinary deference due to an agency's interpretation of its own regulation. This Court should grant the petition to resolve the questions arising out of the Ninth Circuit's transformative construction of the Clean Water Act and to restore to EPA and the Corps their rightful roles in administering this important federal statute.

I. THE BROAD RAMIFICATIONS OF THE NINTH CIRCUIT'S DECISION MARK THIS CASE AS ONE OF EXCEPTIONAL IMPORTANCE

The Ninth Circuit's decision immediately impacts the administration of the Clean Water Act. It also has serious, direct economic implications for both the mining industry and western States, such as Alaska, Arizona, California, and Nevada, that produce, as a group, nearly a third of the nation's nonfuel minerals and that rely significantly on mining for their economic well-being. Moreover, should this decision stand, environmental groups that disagree with how Congress, EPA, and the Corps have exercised their discretion by balancing environmental interests with wise use of natural resources are likely to use this decision as a springboard to challenge hard rock and other mining throughout the country.

A. The Ninth Circuit's Decision Radically Alters The Longstanding Structure Of The Clean Water Act's Discharge Permit Programs

For over three decades, EPA and the Corps have specialized in different, important aspects of managing our Nation's waters. In the Clean Water Act, Congress tasked EPA with protecting water quality by restricting the addition of toxic chemicals into jurisdictional waters. 33 U.S.C. § 1251(a), (d). Effluent limitations promulgated by EPA typically address issues such as toxicity by restricting concentrations of contaminants and total suspended solids ("TSS") to small amounts that are measured in milligrams per liter. *See, e.g.*, 40 C.F.R. § 440.12(a) (limiting "[t]he concentration of pollutants discharged in mine drainage from mines operated to obtain iron

ore" to a daily average of 1.0 mg/L of iron and of 20.0 mg/L of TSS); *id.* § 440.24 (for aluminum ore mining, limiting daily averages to 0.5 mg/L of iron, 1.0 mg/L of aluminum, and 20 mg/L of TSS). As EPA and the Corps have explained, however, "[t]here are no statutory or regulatory provisions under the section 402 program designed to address discharges that convert waters of the U.S. to dry land." Proposed Revisions to Regulatory Definitions, 65 Fed. Reg. at 21,292.

Discharges of fill material, in contrast, are not measured in milligrams per liter; instead, such discharges may exceed a thousand tons of relatively solid material per day. C.A. E.R. 295. The Corps has long experience with special considerations arising from filling jurisdictional waters. Under the Section 404(b)(1) program, the Corps evaluates whether to permit a discharge of fill material into a body of water through a "careful consideration of the effects of the discharge on the aquatic ecosystem as a whole, as well as evaluation of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects," and it also considers "effects on human health, recreation, aesthetic, and economic values." Proposed Revisions to Regulatory Definitions, 65 Fed. Reg. at 21,293.

In spite of Congress's clear intent to create Section 404 as a separate program to permit discharges of fill material and to address the special considerations such discharges present, future requests for permission to discharge fill material will, at least in the Ninth Circuit, have to comply with the requirements of Section 402 when EPA has promulgated effluent limitations. *See* App., *infra*, 15a (rejecting argument that "§ 301 and § 306 do not apply to § 404 permits"). The Ninth Circuit's decision significantly

narrows the application of the Section 404 program—previously an important permitting mechanism that covered all discharges of fill material—to only that subset of fill material discharges for which EPA has not yet imposed an effluent limitation. No longer, in the Ninth Circuit, does the Section 404 permit program operate as an exception to the Section 402 program. There, the Section 404 program is allowed only residual application.

Left undisturbed, this interpretation will require EPA and the Corps to restructure how they administer the Act and will narrow the role that Congress set out for the Corps in the Act. For example, the Corps' ability to efficiently address common fill activities by issuing a Nationwide Permit ("NWP") for such activities will be hampered whenever an effluent limitation might apply, as each instance of the activity would then need to be evaluated under the Section 402 program. At the same time, the Corps' personnel will need to become familiar with all potentially relevant effluent limitations in order to ensure that they do not issue Section 404 permits conflicting with those numerous now-applicable requirements; correspondingly, EPA personnel will have to increase their oversight under Section 404(c) to ensure compliance. The joint development of Section 404(b)(1) guidelines to meet specific criteria set out by Congress, *see* 33 U.S.C. §§ 1344(b)(1), 1343(c), will be largely supplanted by the technology-based criteria of Sections 301 and 306. Topping things off, the agencies will need to decide whether to implement these changes nationwide or to develop a special process within the Ninth Circuit.

B. The Ninth Circuit's Decision Will Severely Harm the Nation's Mining Industry

The Ninth Circuit's decision severely restricts the mining industry's ability to use the Section 404 permit program within the Ninth Circuit. Indeed, requiring discharges of mine tailings to comply with effluent limitations significantly "impair[s] . . . environmentally sound mine operations of all kinds throughout the country." Nat'l Mining Ass'n C.A. Amicus Br. 2 (hereinafter "NMA C.A. Br.").

Section 404 permits are often necessary because "[m]ining activities must occur where the mineral resources are found, and the terrain in those areas is often such that the only feasible site for disposal is in a water body." NMA C.A. Br. 7. Mining inherently produces excess materials, including rock, dirt, and other tailings. These materials, particularly crushed rock, swell in volume and so cannot all be disposed of by backfilling. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001); C.A. J.S.E.R. 835–36. At the same time, minerals are often located in mountainous regions, such as in Alaska and "in the Appalachian Mountains, in a broad area stretching from Pennsylvania to Alabama[] and including Kentucky, Virginia[,] and West Virginia," where the available "stable locations for the placement of excess rock are mostly the bottom of hollows which, as a simple matter of topology, form streams." NMA C.A. Br. 8.

Applying effluent limitations to mine tailings will affect numerous types of mines because "EPA has promulgated effluent limitations for a vast number of substances commonly present in the excess rock and dirt from mines." Nat'l Mining Ass'n C.A.

Amicus Br. In Support of Pet. for Reh'g En Banc 17; *see generally* 40 C.F.R. Pts. 434, 440 (listing effluent limitations for numerous types of mining operations). By eliminating the ability of mines to use a body of water to settle out excess dirt and rock, mining operations will have to seek out alternative means of disposal that may, as the Corps found in rejecting such alternatives for the Kensington mine, lead to a greater loss of wetlands, to aesthetic harms (such as the creation of unsightly tailings stacks), and other environmental costs. *See, e.g.*, C.A. J.S.E.R. 872. These additional costs inevitably will stifle both resource exploration and mine development.

As Coeur's situation illustrates, if Section 402 effluent limitations replace Section 404 as the regime governing discharges of mine tailings, mines previously eligible for Section 404 permits will be unable to operate as planned, years of planning and significant financial investments (here, approximately $200 million, C.A. J.S.E.R. 1064) made in reliance on decades of agency practice notwithstanding. For example, NWP 44, issued to authorize "aggregate mining and hard rock/mineral mining activities" where the discharge would "not cause the loss of greater than ½-acre of non-tidal waters of the United States," Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,139, 11,189 (Mar. 12, 2007), is now vulnerable to challenge; despite the fact that it "authorizes mining activities that [in the judgment of the agencies] have no more than minimal individual and cumulative adverse effects on the aquatic environment," *id.* at 11,140, any "no discharge" effluent limitation would prohibit even these "minimal" discharges.

The effects of Ninth Circuit's decision will be felt throughout the Nation. The mining industry is a

significant contributor to the national economy. "The total value of U.S. raw nonfuel mineral production alone was about $64.4 billion." Mineral Commodity Summaries 2007, at 7. Six metals, five of which are governed by the same froth-flotation performance standard relevant to this case (and the sixth of which is governed by other effluent limits), contribute a combined total of $22.7 billion dollars towards that total. *Id.* at 52 (copper: $8.6 billion), 70 (gold: $5.1 billion), 110 (molybdenum: $3.2 billion), 82 (iron ore: $2.8 billion), 186 (zinc: $2.3 billion), and 92 (lead: $702 million).

Most of those metals are mined in the Ninth Circuit. *See* U.S. Dep't of the Interior, U.S. Geological Survey, Mineral Commodity Summaries 2007, at 13, available at http://minerals.usgs.gov/minerals/pubs/mcs/2007/mcs2007.pdf. Gold is produced primarily in Alaska and other western States; Alaska and Nevada are the leading producers of silver; Arizona, Nevada, and Montana are three of the top five copper-producing States; Idaho, Arizona, Montana, and Nevada are leading producers of molybdenum; Alaska, Idaho, Montana, and Washington are four of the top five lead-producing States; and three of the four states that produce 99% of the Nation's domestic zinc are Alaska, Montana, and Washington. *Id.* at 70, 148, 52, 110, 92, & 186.

Effluent limitations currently in place apply to each of these types of ores and to numerous types of mining operations, including open-pit operations, underground operations, placer deposits, froth-flotation processes, dump processes, heap processes, in-situ leach processes, vat-leach processes, and gravity separation methods. *See generally* 40 C.F.R. Part 440, Subparts J & M. Should the Ninth Cir-

cuit's decision stand, discharges of mining-related materials that previously qualified as fill material in the Ninth Circuit must now comply with these regulations, including zero-discharge standards of performance, formerly applicable only under Section 402.

C. The Ninth Circuit's Decision Threatens To Disrupt The Economies Of Alaska And Other Western States

"Mining is a critical part of [Alaska's] economy," Alaska's C.A. Br. Re Reh'g En Banc 15; for example, it contributed $1.8 billion dollars to Alaska's economy in 2005. C.A. J.S.E.R. 644. As explained above, mining inherently produces excess rock, dirt, and other tailings that swell in volume and so cannot all be disposed of by backfilling. Approximately half of Alaska's land mass consists of wetlands. Taken together, these facts demonstrate the importance of fill-material permits to the State of Alaska and to the citizens of Alaska who rely on mining for their livelihood.

If discharges of these excess mining materials into wetlands in Alaska must comply with a zero-discharge Section 306 standard of performance, then other important mining projects in Alaska, including pending and future projects for which "[t]he agencies' [Section 404] permitting plan is expected to be a critical component," Alaska's C.A. Pet. Reh'g En Banc 16, will have to cease or delay operations (or pay penalties, 33 U.S.C. §§ 1319, 1365) until such time as their operations can be brought into compliance with the zero-discharge standard of performance—which is to say, never. In many locations placement of tailings on dry land is not practicable,

and compliance with the Ninth Circuit's construction of the Act otherwise is not possible. The decision below thus threatens serious harm to the Alaskan economy.

Alaska, moreover, is not alone. Other States within the jurisdiction of the Ninth Circuit also rely on mining (and its creation of jobs and income for their residents) as a significant part of their economies. Indeed, the top three States in the Nation in terms of nonfuel mineral production are Arizona ($4.35 billion in 2005), California ($4.25 billion in 2005), and Nevada ($3.88 billion in 2005), and the nine states combine to contribute 31% of total U.S. nonfuel mineral production. U.S. Dep't of the Interior, U.S. Geological Survey., 2005 Minerals Yearbook, Statistical Summary at 2.5–2.6 (Aug. 2007), *available at* http://minerals.usgs.gov/minerals/pubs/commodity/statistical_summary/myb1-2005-stati.pdf. Mining in these States often takes place in mountainous areas where it is often impracticable to dispose of mine tailings except by placing them as fill material in drainage channels, wetlands, or other waters. The Section 404 permit program thus is important in these States just as it is in Alaska. In the absence of a permit program that permits deposition of tailings in jurisdictional waters, these mines, too, will have to develop new plans of operations—plans that promise to be more expensive and that may well be more environmentally damaging (as the Corps found to be the case for the alternatives to issuing a Section 404 permit for the tailings placement at issue here).

II. THE NINTH CIRCUIT'S CONSTRUCTION OF THE CLEAN WATER ACT CONTRAVENES THE ACT'S TEXT AND STRUCTURE, DECISIONS OF THIS COURT, AND DECISIONS OF OTHER COURTS OF APPEALS

In restructuring EPA's and the Corps' permitting authority under the Act to invalidate Coeur's Section 404 permit, the Ninth Circuit ignored well-established rules of interpretation, basic principles of logic, the structure of the Clean Water Act, and even a provision expressly exempting Section 404 permits from effluent limitations. Unsurprisingly, the result achieved cannot be reconciled with this Court's decisions, including *Rapanos v. United States*, 126 S. Ct. 2208 (2006), and *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006), or with the decisions of other courts of appeals.

1. The Ninth Circuit grounded its novel reconstruction of the Act's permitting programs—"[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge"—on the use, in Section 301(a), of the conjunction "and." App., *infra*, 12a, 15a; *see* 33 U.S.C. § 1311(a) ("Except as in compliance with this section and sections [302], [306], [307], [318], [402] *and* [404] of this title, the discharge of any pollutant by any person shall be unlawful." (emphasis added)). "The use of 'and' as a connector, instead of 'or,'" the panel reasoned, meant that "*any* discharge" had to comply with "both § 301 and § 306, as well as § 402 and § 404," and "indicates that Congress intended for [Section 301] effluent limitations and [Section 306] standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404." App., *infra*, 15a.

But context clearly demonstrates that the conjunction "and" cannot be read to impose the statutory obligations that the Ninth Circuit ascribed to it.

As this Court explained long ago, "courts are often compelled to construe '*or*' as meaning '*and*,' and again '*and*' as meaning '*or*.' *United States v. Fisk*, 70 U.S. 445, 447 (1866); *see also Slodov v. United States*, 436 U.S. 238, 246–48 (1978) (interpreting "and" as "or" to avoid result "obviously at odds with the statute's purpose"). When the word "and" "conjoins a list of mutually exclusive alternatives," "context *requires* the term to be construed disjunctively." *Officemax, Inc. v. United States*, 428 F.3d 583, 591 (6th Cir. 2005) (Sutton, J.) (emphasis added).

This, clearly, is such a case. Section 301 does not, as the panel states, require one to obtain permits under both Section 402 *and* 404 for the same discharge. This Court recently recognized that Section 402 and Section 404 are mutually exclusive permitting schemes. *See Rapanos*, 126 S. Ct. at 2228 (plurality opinion) (contrasting "pollutants normally covered by the permitting requirement of [Section 402(a)]" with "dredged or fill material" and explaining that "[t]he Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)]"); *id.* at 2237 (Kennedy, J., concurring) ("*Apart from* dredged or fill material, pollutant discharges require a permit from [EPA], which also oversees the Corps' . . . permitting decisions.") (emphasis added). Numerous courts of appeals have similarly acknowledged this mutual exclusivity. *See, e.g., Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 (7th Cir. 2004) ("[A] defendant who wishes to discharge a pollutant must first obtain a permit *either* under [Section 404] for the discharge of

dredged or fill material *or* under [Section 402] for other pollutants.") (emphases added).[4] Both agencies charged with administering the two permitting schemes agree that Section 301 only requires compliance with "one of the two permitting programs." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,130 (May 9, 2002). Even SEACC acknowledged that "[t]he Act provides that a single discharge will be governed by either section 402 or section 404, but not both." Appellants' C.A. Br. 24.

2. Nor is it true, as the panel stated, that the use of "and" in Section 301 compels the conclusion that "[Section 301] effluent limitations and [Section 306] standards of performance [ ] apply to . . . discharges" that "qualify for permitting under § 404." The text of the Clean Water Act, in addition to its two-part structure, in fact compels the opposite conclusion. Whereas Section 402(a) explicitly requires that permitted discharges comply with both Section 301 effluent limitations and Section 306 performance stan-

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[4] *See also Kentuckians*, 317 F.3d at 447 (4th Cir. 2003) (recognizing that "cross-references, exclusions, and vetoes" interlocking Sections 404 and 402 "reinforc[ed] the fill-effluent distinction that has been followed by the agencies"); *Friends of Crystal River v. U.S. E.P.A.*, 35 F.3d 1073, 1075 (6th Cir. 1994) ("The Act establishes two discrete permitting systems by which individuals might obtain permits from the appropriate federal agency."); *State of Minn. by Spannaus v. Hoffman*, 543 F.2d 1198, 1208 (8th Cir. 1976) ("Unlike all other pollutants, dredged spoil [and fill material] [are] not regulated under the NPDES, since [§] 402(a)(1) establishing the NPDES begins, as we have seen, with the words, '(e)xcept as provided in sections 318 and 404.'") (citation and footnote omitted).

dards, Section 404 does not, instead expressly requiring compliance with different water-quality standards (and additional requirements) developed under Section 404(b)(1). *Compare* 33 U.S.C. § 1342(a), *with id.* § 1344. The panel dismissed this fact—that "§ 402 explicitly requires compliance with [Sections 301 and 306] whereas § 404 does not"—as a mere "negative inference" of an "implied exception." App., *infra*, 15a.

But the exception is hardly inferential: Section 404(p), apparently overlooked by the panel, explicitly provides that "[c]ompliance with a permit issued pursuant to this section . . . shall be deemed compliance . . . with [Section 301]." 33 U.S.C. § 1344(p). *Compare id.*, with App., *infra*, 18a ("§ 404 does not contain an explicit exception to effluent limitations").[5] But even setting aside Section 404(p)'s affirmative, express exception for effluent limitations, this Court recently reiterated, in another Clean Water Act case, that "if 'Congress includes particular language in one section of a statute'"—as Congress did in Section 402, stating that Sections 301 and 306 apply under that section—"'but omits [that language] in another section of the same Act'"—as Congress did in Section 404—"'it is generally presumed that Con-

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[5] SEACC has suggested that Section 404(p) does not apply here because it refers only to Section 301, and not to Section 306. Given, however, that "[a] standard of performance is one type of effluent limitation" and that all effluent limitations "have the same practical effect" of restricting the discharge of pollutants, App., *infra*, 13a n.8, it would be quite strange if compliance with Section 404 did not also similarly constitute compliance with the particular type of effluent limitation (i.e., performance standards) mandated by Section 306.

gress acts intentionally and purposefully in the disparate inclusion or exclusion.'" *S.D. Warren Co.*, 126 S. Ct. at 1852 (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)). Congress clearly expressed its intent to impose different requirements under the different programs—compliance under Section 402 with effluent limitations, including performance standards, and compliance under Section 404 with Section 404(b)(1) guidelines—and even expressly exempted discharges of fill material from compliance with effluent limitations. Yet the Ninth Circuit concluded that Congress intended that Section 404 permits comply with effluent limitations.

3. Attempting to bolster its conclusion that Section 306(e) applies under Section 404, the Ninth Circuit also relies on the fact that Congress phrased Sections 301(e) and 306(e) broadly to establish (in the panel's words) "blanket prohibitions" that apply to "*all*" and "*any*" discharges. App., *infra*, 15a–16a. This conclusion, however, is at odds with a number of more specific requirements set out in the Act: first, the requirement that permits issued under Section 404 comply with Section 404(b)(1) guidelines, 33 U.S.C. § 1344(b)(1); second, Section 404's exemption from compliance with Section 301, *id.* § 1344(p); and third, Congress's conspicuous failure to specify that Sections 301 and 306 apply under Section 404, *cf.* § 1342(a).

In the face of these more specific provisions, the Ninth Circuit's reliance on Section 301's and Section 306's more general language violates the well-settled canon of statutory interpretation that "specific statutory language should control more general language when there is a conflict between the two." *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S.

327, 335 (2002); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). This is particularly disturbing in light of the Ninth Circuit's acknowledgement of this canon, *see* App., *infra*, 32a, and its recognition of Section 404 as "a limited permit program that applies only to dredged or fill material," *id.* 15a. Thus, to the extent that the general prohibitions on discharges in Sections 301 and 306 appear to conflict with Section 404's specific exception permitting discharges of fill material as long as they comply with Section 404(b)(1) guidelines, Section 404 ought to control. *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . ., particularly when the two are interrelated and closely positioned, both in fact parts of" the same statutory scheme.); *Townsend v. Little*, 109 U.S. 504, 512 (1883) (explaining the "well-settled rule" that "general and specific provisions, in apparent contradiction . . ., may subsist together, the specific qualifying and supplying exceptions to the general").

4. The Ninth Circuit's flawed construction of the Clean Water Act is a direct result of its cart-before-the-horse approach to statutory interpretation. The Ninth Circuit started with the proposition that the two regulations potentially implicated by the discharge—that is, the froth-flotation effluent limitation and the regulation defining "fill material"—conflicted intractably, and then interpreted the *Act* in light of those *regulations*. *See, e.g.*, App., *infra*, 9a–10a ("Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern . . ., but they result in different interpreta-

tions of the Act."). Under this approach, the existence of an EPA *regulation* setting out effluent limitations on rock, sand, and dirt (quintessential examples of fill material) could nullify a *statutory provision* (Section 404) and could negate Congress's clear intent to create a Corps-administered program for permitting discharges of fill material. As the Clean Water Act itself makes clear, however, one must first determine which permitting scheme applies before one can know whether effluent limitations would apply to the discharge. And, according to the two agencies charged with administering the Act, the line of demarcation between the two permit programs is the definition of "fill material," which is supplied by a joint EPA-Corps regulation not challenged in this litigation.

III. THE NINTH CIRCUIT'S REFUSAL TO DEFER TO CORPS' INTERPRETATION OF ITS OWN REGULATION CONFLICTS WITH THIS COURT'S PRECEDENTS

As an alternative holding, the Ninth Circuit posited that the Corps (and EPA) unreasonably interpreted the joint EPA-Corps fill rule—which provides that a "discharge of fill material" "includes . . . placement of . . . slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f)—to include Coeur's proposed mine tailings. *See* App., *infra*, 19a–31a. The Ninth Circuit refused to defer to the Corps' interpretation of its regulation defining fill material, concluding that statements in the "regulatory history"—not the regulation itself—were "dispositive and compel the conclusion that the Corps overstepped its authority in issuing a permit to Coeur Alaska under § 404." *Id.* 31a. *But see* Final Revisions to Regulatory Definitions, 67 Fed. Reg. at 31,135 ("mining-related material that has the effect

of fill when discharged will be regulated as 'fill material'"); *see also id.* ("EPA has never sought to regulate fill material under effluent guidelines"). The Ninth Circuit's approach cannot be reconciled with this Court's decisions.

1. It is axiomatic that a court must defer to an agency's construction of its own regulation unless that interpretation is "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The joint EPA-Corps regulation defining "discharge of fill material" explicitly states that the term "includes, without limitation, . . . placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.

It is, of course, difficult to envision how an agency's interpretation can "facially meet[]" a regulation, App., *infra*, 10a, yet nevertheless be "'inconsistent with the regulation.'" *Auer*, 519 U.S. at 461. The Ninth Circuit's position seems to be that, even where agency's interpretation is consistent with the *text* of its regulation, that interpretation may nevertheless be rejected as unreasonable if an examination of regulatory *history* demonstrates that the text does not accurately reflect the agency's regulatory intent. *See* App., *infra*, 19a–20a. That is clearly wrong. In *United States v. Locke*, 471 U.S. 84 (1985), this Court explained that where statutory language "is plain and the agency's construction completely consistent with that language, the agency's construction simply cannot be found 'sufficiently unreasonable' as to be unacceptable." *Id.* at 96. If courts may not find an agency's interpretation of a *statute* unreasonable when the interpretation is consistent with the statute's text, it is even more apparent that

they may not, under an even more deferential test, find an agency's interpretation of its own *regulation* unreasonable when that interpretation is completely consistent with the regulation's plain text.

The court of appeals' refusal to defer to the agencies' interpretation of their own joint regulation wrested from the agencies the authority Congress delegated to them to determine where to draw the line separating discharges of fill material from discharges of all other pollutants. This contravenes this Court's guidance that Congress expects agencies to make "substantive choices" when it "leaves the intersection of competing objectives . . . imprecisely marked." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (agency interpretations that resolve "fundamental ambiguit[ies]" resulting from "differing mandates" in statutory texts by developing a "'reasonable interpretation' of the statutory scheme" are "entitled to deference").

As the Fourth Circuit has explained, Sections 402 and 404 "might overlap on certain types of 'fill material' that adversely affect the quality of water," but any such overlap can be resolved by regulations defining "fill material." *Kentuckians*, 317 F.3d at 447–48. In other words, the Fourth Circuit recognized that a regulation defining "fill material" does not *conflict* with a regulation establishing an effluent limitation, as the Ninth Circuit would have it. Quite the opposite, it *resolves* any "overlap" between Sections 404 and 402 by determining the appropriate permitting regime for a particular discharge. Thus, the plain language in the 2002 regulation—which defined "discharge of fill material" to include "slurry,

or tailings or similar mining-related materials," 40 C.F.R. § 232.2—is entirely consistent with the agencies' settled understanding that tailings, including tailings left over after time-honored practices such as the froth-flotation process regulated under an effluent limitation since 1982, are governed by Section 404, not Section 402.

There is no reason to think the Ninth Circuit is better equipped than Congress, EPA, or the Corps—let alone all three—to decide how to balance interests in protecting the environment against interests in "reasonable development," "infrastructure development," and "growth of the economy." U.S. Army Corps of Eng'rs, Regulatory Program Mission Statement, http://www.usace.army.mil/cw/cecwo/reg/ mission.htm (last visited Jan. 7, 2008).

2. As the Ninth Circuit acknowledged, SEACC did not challenge the validity of the joint EPA-Corps regulation defining "fill material." App., *infra*, 25a–26a n.12. Accordingly, the court of appeals stated that it did "not reach the issue of the validity of these regulations." *Id.* In addition to this disclaimer, the Ninth Circuit affirmatively recognized that "[t]he Clean Water Act does not define the term 'fill material'" and that, instead, "Congress implicitly left that term to the Corps and EPA to define." *Id.* 22a; *see also Kentuckians*, 317 F.3d at 444 ("[W]e conclude that Congress has not clearly spoken on the meaning of 'fill material[.]'"). This admission demonstrates that the Ninth Circuit had no authority under *Chevron* step one to invalidate the regulation. Under step one of *Chevron*, a court may strike down an agency interpretation of a statute only when "'Congress has spoken directly to the precise question at issue'" and the agency interpretation defies "the unambiguously

expressed intent of Congress.'" App., *infra*, 11a (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

Under these circumstances (where SEACC had not raised the issue and where the Ninth Circuit acknowledged that Congress did not unambiguously express its intent, but rather "left that term to the Corps and EPA to define," App., *infra*, 22a), the Ninth Circuit, by its own admission, had no authority to invalidate the agencies' reasonable joint interpretation of ambiguous statutory language. Thus, the decision's references to the Act's "plain" and "unambiguous" language, *see* App., *infra*, 10a, 15a, 19a, 35a, can only be understood either as relating to statutory language other than "discharge of fill material" or as a backdoor attempt to challenge the validity of the joint regulation itself—a regulation SEACC has not challenged and would have had no basis to challenge under *Chevron*.

CONCLUSION

Further percolation in the courts of appeals is unnecessary—the issue raised by this petition is already crystallized. Moreover, additional decisions by other courts of appeals are unlikely to lead the Ninth Circuit to change its view, given that it has already denied rehearing en banc. In light of the exceptional national importance of this case and for all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 28, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 06-35679.

SOUTHEAST ALASKA CONSERVATION COUNCIL; Sierra Club; Lynn Canal Conservation,

Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; Timothy J. Gallagher, Colonel, in his official capacity as District Engineer; Larry L. Reeder, in his official capacity as Chief of the Regulatory Branch; Dominic Izzo, in is official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); United States Forest Service,

Defendants-Appellees,

Coeur Alaska, Inc.; Goldbelt, Inc.; State of Alaska,

Defendants-Intervenors-Appellees.

Argued and Submitted Dec. 4, 2006.
Filed May 22, 2007.

* * * *

Thomas S. Waldo and Demian A. Schane, Earthjustice, Juneau, AK, for plaintiffs-appellants. John T. Stahr and Mark A. Nitczynski, U.S. Department of Justice, Environment & Natural Resources Division, Washington, D.C., for defendants-appellees.

David J. Burman and Robert A. Maynard, Perkins Coie LLP, Boise, Idaho; John C. Berghoff, Jr., and Michael P. Rissman, Mayer Brown Rowe & Maw LLP, Chicago, IL; Cameron M. Leonard, State of Alaska, Department of Law, Fairbanks, AK; and David C. Crosby, David C. Crosby PC, Juneau, AK, for defendants-intervenors-appellees.

Melissa Powers and Allison LaPlante, Pacific Environmental Advocacy Center, Portland, OR; Joseph M. Lovett, Appalachian Center for the Economy & the Environment, Lewisburg, WV; and Peter Van Tuyn, Bessenyey & Van Tuyn, Anchorage, AK, for amici curiae in support of plaintiffs-appellants.

John W. Hartle, City and Borough of Juneau, Juneau, AK; Amy Gurton Mead, Robertson, Monagle & Eastaugh, Juneau, Alaska; Steven J. Lechner, Mountain States Legal Foundation, Lakewood, CO; Michael R. Shebelskie, Hunton & Williams LLP, Richmond, Virginia; Harold P. Quinn, Jr., National Mining Association, Washington, D.C.; and Stephen F. Sorensen, Simpson, Tillinghast & Sorensen PC, Juneau, AK, for amici curiae in support of defendants-appellees.

Appeal from the United States District Court for the District of Alaska; James K. Singleton, Senior District Judge, Presiding. D.C. No. CV-05-00012-J-JKS.

Before PROCTER HUG, JR., A. WALLACE TASHIMA, and SUSAN P. GRABER, Circuit Judges.

HUG, Circuit Judge.

This case presents the question of whether the issuance of a permit by the U.S. Army Corps of Engineers violates the Clean Water Act.[1] The permit issued in this case authorizes Coeur Alaska, Inc., to discharge process wastewater containing tailings from its gold mine into a lake that is a navigable water of the United States. Coeur Alaska proposes to discharge daily 210,000 gallons of process wastewater containing 1,440 tons of tailings from its mine into Lower Slate Lake. The tailings in the discharge will raise the bottom elevation of the lake by 50 feet. A 90-foot high, 500-foot long dam will be built to contain the discharge and the area of the lake will be increased about three-fold. The U.S. Army Corps of Engineers contends that the permit was properly granted under § 404 of the Clean Water Act, which relates to the disposal of "fill material," and that it is not subject to the effluent restrictions of § 301 or § 306 of the Clean Water Act. The plaintiffs contend that this mine disposal discharge must comply with the effluent restrictions of § 301 and § 306, and that any permit allowing discharge must be issued by the Environmental Protection Agency. The district court held that the issuance of the permit was proper. We reverse and remand with instructions to vacate the permit.[2]

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[1] 33 U.S.C. §§ 1251–1387.

[2] We also vacate the permit granted to Goldbelt, Inc., to construct the Cascade Point Marine Facility in Berners Bay and the U.S. Forest Service's Record of Decision approving the general plan because they are dependent on

[Footnote continued on next page]

I.

Coeur Alaska intends to open the Kensington Gold Mine on the site of a prior mine in southeast Alaska that operated from 1897 to 1928. Although the mining operation will include several above-ground facilities, the mine itself will be entirely subterranean.

To process the gold ore retrieved from the mine, Coeur Alaska will construct a froth-flotation mill facility. In the froth-flotation process, ore-bearing rock from the mine will be transported to a mill and moved through a series of mechanical crushing and grinding procedures. After the rock is finely ground, it will be fed into a tank where water and chemicals referred to as conditioners, frothers, surfactants, and scale inhibitors will be added. Air is then pumped into the tank, producing bubbles that attach to the gold deposits. The bubbles rise, bringing the gold with them and forming a froth that is skimmed off the top.

After the gold has bubbled up to the surface and the froth is removed, the tailings-residual ground rock-remain as a waste product. Of the 2,000 tons of ore that the Kensington mine will process each day, only about 100 tons (5 percent) contain economically viable gold minerals. About 40 percent of the tailings will be used as backfill in the mine. The remaining volume is, according to Coeur Alaska, too large to transport off site and presents a waste disposal prob-

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[Footnote continued from previous page]

the validity of the permit issued by the U.S. Army Corps of Engineers to Coeur Alaska.

lem. This dispute arises from Coeur Alaska's current plan for addressing that disposal problem.

Coeur Alaska's earlier plan of operations for the Kensington Gold Mine called for the construction of a "dry tailings facility," in which the mine would dispose of waste from its froth-flotation mill on dry "uplands." This disposal process involved the construction of berm and drainage structures around the designated disposal area, dewatering the process wastewater, and placement of the tailings within an enclosure. After the closure of the mine in about 10 to 15 years, Coeur Alaska would have been required to cover the disposal area with native material to support revegetation. The U.S. Forest Service ("Forest Service") approved the plan of operations for the dry tailings facility, and the U.S. Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") issued permits to the company authorizing the construction of this facility in 1997. The price of gold subsequently dropped to $400 an ounce, however, prompting Coeur Alaska to investigate less expensive ways to develop the mine project.[3] In 2004, Coeur Alaska proposed a new plan of operations with significant amendments. The most important change for our purposes was that, instead of the dry tailings facility, Coeur Alaska proposed to discharge its process wastewater containing the tailings directly into nearby Lower Slate Lake.

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[3] The price of gold has since been rising steadily and is currently over $680 an ounce, thus the original motivation for the change in waste disposal from the mine no longer exists.

Lower Slate Lake, a 23-acre subalpine lake in the Tongass National Forest, is one of several small lakes in the vicinity of the mine. The lake is a fish and wildlife habitat and supports about 1,000 Dolly Varden Char (a freshwater fish) and other native fish and aquatic life. The lake is also a tributary of Slate Creek and drains into Berners Bay.

Coeur Alaska's current disposal plan involves piping approximately 210,000 gallons of process wastewater, including 1,440 tons of tailings, each day to the bottom of Lower Slate Lake in the form of a slurry. This slurry would consist of about 45 percent water and 55 percent tailings. A polymer and flocculent would be added to the slurry to enhance settling of the tailings. Over the 10- to 15-year life of the mine, approximately 4.5 million tons of tailings would be deposited into the lake. The discharge ultimately would raise the bottom of the lake 50 feet, to its current high water mark, and nearly triple its surface area. Coeur Alaska and the Corps admit that the discharge and settling of the tailings into the lake would kill all the fish and nearly all the aquatic life. The effluent would have a pH factor of over 10, which is considerably higher than the lake's current pH factor, and would contain concentrations of several potentially hazardous materials, including aluminum, copper, lead, and mercury. The toxicity of the discharge may have lasting effects on the lake and may negatively affect its ability to sustain aquatic life in the future. The Corps intends that aquatic life would be reintroduced into the lake, but the extent to which aquatic life could be restored eventually is unclear.

To prepare the lake for use as a wastewater disposal facility and the consequent expansion of the lake's

surface, Coeur Alaska would construct a 90-foot high, 500-foot long dam at the lake's outfall point. Coeur Alaska's long-term plan to use the lake as a disposal facility also includes the construction of a diversion ditch. Constructing the ditch would require cutting trees on 7.6 acres of forested land, building a 30-foot wide road, excavating and digging a 3,000-foot ditch, and filling in 4.3 acres of nearby wetlands with 28,800 cubic yards of fill material. In addition, during the 10- to 15-year period of the lake's use as a disposal facility, Slate Creek would be diverted around the lake through a pipeline.

The Forest Service approved Coeur Alaska's current plan of operations at the Kensington Gold Mine, including the revised disposal plan, in a Record of Decision ("ROD") on December 9, 2004. Because the proposed discharge would have the effect of raising the bottom elevation of Lower Slate Lake, the Corps reasoned that the permit program under § 404 of the Clean Water Act, rather than § 402, applies to Coeur Alaska's planned discharges. Accordingly, the Corps issued a permit for the discharge into Lower Slate Lake on June 17, 2005.

Under the permit, when operations at the mine eventually cease, the Corps would require Coeur Alaska to mitigate the environmental impacts at the lake by installing a cap of native material over the tailings at the bottom of the lake. The Corps would also require Coeur Alaska to reintroduce native fish species into the lake and monitor the health of the ecosystem.

II.

Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") filed this lawsuit challenging the Corps' permit and the Forest Service's ROD approving the

general plan on the grounds that they violate § 301(a), § 301(e), and § 306(e) of the Clean Water Act. The crux of SEACC's argument is that the Corps violated the Clean Water Act by issuing a permit for the discharge of process wastewater from a froth-flotation mill into a body of water protected by the Clean Water Act.

After the complaint was filed, the Corps decided to suspend the permit and reconsidered its decision to issue the permit. For that purpose, the Corps moved for voluntary remand of the case before briefing on the merits began, which the district court granted on November 14, 2005. The Corps reinstated the original permit, without changes, on March 29, 2006. At the same time, the Corps issued a revised ROD in which it explained its rationale. SEACC then filed an amended complaint, in which it reiterated its allegations and reasserted its causes of action. Coeur Alaska, Goldbelt, Inc., and the State of Alaska intervened as defendants. The parties filed cross-motions for summary judgment.

The district court granted summary judgment to the defendants on August 4, 2006. In its opinion, the district court focused on whether the Corps misapplied § 404 of the Clean Water Act. The district court noted that SEACC challenged the granting of the permit on the grounds that it did not comply with § 301(e) and § 306(e). It held that if the permit was issued under § 404 for the disposal of "fill material," then § 301(e) and § 306(e) were inapplicable.

SEACC appealed on August 7, 2006, three days after the district court's decision, and this court, on SEACC's motion, granted an injunction pending appeal on August 24, 2006, which prohibited Coeur Alaska, the Corps, and the Forest Service from pro-

ceeding with further construction activities related to preparing the lake for use as a waste disposal site. *See SEACC v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1099 (9th Cir. 2006). Since granting the injunction, we have addressed two emergency motions related to stabilizing a temporary coffer dam that was hastily constructed by Coeur Alaska prior to the injunction. *Id.*; *SEACC v. U.S. Army Corps of Eng'rs*, 479 F.3d 1148, 1151–52 (9th Cir. 2007).

III.

We review the district court's grant of summary judgment de novo and must determine whether the district court correctly applied the relevant substantive law. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 973 (9th Cir. 2003); *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). "De novo review of a district court judgment concerning a decision of an administrative agency means the court views the case from the same position as the district court." *Turtle Island*, 340 F.3d at 973 (citing *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)). Judicial review of administrative decisions under the Clean Water Act is governed by § 706 of the Administrative Procedure Act ("APA"). *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). Under the APA, a court may set aside an agency action if the court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Turtle Island*, 340 F.3d at 973.

IV.

Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern Coeur Alaska's proposed plan of operations at

the Kensington Gold Mine, but they result in different interpretations of the Act. The discharge of wastewater containing tailings from Coeur Alaska's froth-flotation mill operation facially meets the Corps' current regulatory definition of "fill material" because it would have the effect of raising the bottom elevation of the lake. *See* 33 C.F.R. § 323.2(e). Accordingly, under this interpretation, the discharge would be subject to the permit process governed by § 404 of the Clean Water Act. However, EPA previously promulgated a performance standard, pursuant to § 301 and § 306 of the Clean Water Act, that prohibits discharges from froth-flotation mills into waters of the United States. *See* 40 C.F.R. § 440.104(b)(1).

Both of the regulations appear to apply in this case, yet they are at odds. As explained below, the plain language of the Clean Water Act resolves this conflict and requires that the performance standard controls. The statute is unambiguous on this point, and the performance standard applies to discharges from the froth-flotation mill at Coeur Alaska's Kensington Gold Mine into Lower Slate Lake. Furthermore, the federal agencies' clear statements at the time they adopted the current regulatory definition of the term "fill material" demonstrate that they did not intend for waste products subject to effluent limitations and performance standards to be regulated as "fill material." For these reasons the Corps should not have issued a permit to Coeur Alaska under § 404. The district court's grant of summary judgment in favor of the Corps is reversed, and we remand for summary judgment to be entered in favor of the plaintiffs with directions to vacate the permit granted by the Corps.

A.

We begin, as we must, with the text of the Clean Water Act itself to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9, 104 S. Ct. 2778.

1.

Congress passed the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity" of the waters of the United States. 33 U.S.C. § 1251(a). To achieve this objective, the Clean Water Act sought to eliminate completely the discharge of all pollutants into the nation's navigable waters by 1985. 33 U.S.C. § 1251(a)(1). It also sought to make those waters suitable for fish, shellfish, wildlife, and recreation. 33 U.S.C. § 1251(a)(2). One of Congress's principal concerns in passing the Clean Water Act was the use of water for waste disposal, which Congress deemed "unacceptable." *See* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable."), *quoted in Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1043 (9th Cir. 1978).

The "cornerstone" and "fundamental premise" of the Clean Water Act is § 301, which prohibits all discharges of any pollutant except in compliance with

specified provisions of the statute. *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987). Specifically, § 301(a) provides that "the discharge of any pollutant by any person shall be unlawful" except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404.[4] 33 U.S.C. § 1311(a). In furtherance of this mandate, § 301(b) requires EPA to adopt increasingly stringent, technology-based effluent limitations[5] for point sources.[6] Once an effluent limitation is promulgated, § 301(e) requires that it "shall be applied to *all* point sources of discharge of pollut-

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[4] The full text of § 301 states: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

[5] "The term 'effluent limitation' means any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, ... including schedules of compliance." 33 U.S.C. § 1362(11).

[6] "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

ants in accordance with the provisions of" the statute. 33 U.S.C. § 1311(e) (emphasis added).

Similarly, § 306 requires EPA to implement even more stringent "standards of performance" for new sources such as the new Coeur Alaska mine project.[7] 33 U.S.C. § 1316(b). To carry out § 306's directive, EPA must promulgate a list of categories of sources and, for new sources within each category, establish a national standard of performance (also referred to as a New Source Performance Standard). *Id.* A standard of performance is defined as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which [EPA] determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting *no discharge* of pollutants." 33 U.S.C. § 1316(a)(1) (emphasis added). As with the effluent reductions promulgated under § 301,[8] § 306 states that, once a

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[7] "The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. § 1316(a)(2).

"The term 'source' means any building, structure, facility, or installation from which there is or may be the discharge of pollutants." 33 U.S.C. § 1316(a)(3).

[8] A standard of performance is one type of effluent limitation. *See* 33 U.S.C. § 1362(11). Therefore, § 301(e) and § 306(e) have the same practical effect in this case.

standard of performance takes effect, "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e). Congress thus "intended these regulations to be absolute prohibitions." *E.I. du Pont de Nemours & Co. v. Train* ("*Du Pont*"), 430 U.S. 112, 138, 97 S. Ct. 965, 51 L.Ed.2d 204 (1977) (citing S. Rep. No. 92-414, at 58 (1971)). The legislative history of § 306 indicates that Congress made a "deliberate choice not to allow variances for new sources." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 192 (2d Cir. 2004). As such, no exceptions to a standard of performance are allowed. *See id.*; *Du Pont*, 430 U.S. at 138, 97 S. Ct. 965.

To ensure compliance with effluent limitations and performance standards established pursuant to § 301 and § 306, Congress created the National Pollutant Discharge Elimination System ("NPDES") permit program under § 402 of the Act. Through the NPDES program, EPA may permit a discharge, but only if it complies with § 301 and § 306. Additionally, NPDES permits are supposed to limit the release of pollutants into waterways as much as possible by imposing numerical discharge restrictions. *Rybachek v. EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990). For this reason, the NPDES permit program is considered "central to the enforcement" of the Clean Water Act. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977).

In addition to the NPDES permit program, the Clean Water Act established a secondary permit program for the discharge of "dredged or fill material" under § 404. According to § 404, the Corps "may issue permits . . . for the discharge of dredged or fill material

into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). We conclude that the permit scheme under § 404 is a limited permit program that applies only to dredged or fill material, not to the discharge of pollutants from industrial or municipal sources.

2.

The language of the Clean Water Act is clear on the issue at the center of this dispute. First, § 301(a) prohibits *any* discharge that does not comply with several enumerated sections, including both § 301 and § 306, as well as § 402 and § 404. 33 U.S.C. § 1311(a). The use of "and" as a connector, instead of "or," indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404. Second, § 301(e) applies effluent limitations established by EPA to *all* discharges. 33 U.S.C. § 1311(e). Third, § 306(e) prohibits *any* discharge that does not comply with performance standards promulgated by EPA. 33 U.S.C. § 1316(e). In clear and precise terms, § 301 and § 306 require that discharges comply with applicable effluent limitations and standards of performance. Neither § 301 nor § 306 contains an exception for discharges that would otherwise qualify for regulation under § 404. Rather, § 301 and § 306 are "absolute prohibitions" with no exceptions. *Du Pont*, 430 U.S. at 138, 97 S. Ct. 965.

Nevertheless, the defendants argue that § 301 and § 306 do not apply to § 404 permits because § 402 explicitly requires compliance with those sections whereas § 404 does not. The defendants then reason, by way of negative inference, that § 404 contains an implied exception to the requirements of § 301 and

§ 306 whenever a proposed discharge would meet the agencies' regulatory definition of "fill material." We disagree. Negative inferences and implied exceptions are generally disfavored. As the Supreme Court stated in *United States v. Rutherford*, 442 U.S. 544, 99 S. Ct. 2470, 61 L.Ed.2d 68 (1979): "Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *Id.* at 552, 99 S. Ct. 2470 (citing *Helvering v. Hammel*, 311 U.S. 504, 510–11, 61 S. Ct. 368, 85 L.Ed. 303 (1941)). That is because courts have "generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular language. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, --- U.S. ----, 126 S. Ct. 1843, 1852, 164 L.Ed.2d 625 (2006) (quoting *Bates v. United States,* 522 U.S. 23, 29–30, 118 S. Ct. 285, 139 L.Ed.2d 215 (1997)). The defendants have produced no compelling reason to believe that Congress intended an exception within § 404 that it did not explicitly create. If the defendants' interpretation were correct, Congress would have written § 301 and § 306 within § 402, not as separate sections. Moreover, the implied exception urged by the defendants, if adopted, would turn § 404 into an exception that swallows the rule created by § 301, § 306, and § 402 by allowing the Corps to use a negative inference from an exception clause within § 402. Thus, § 404's silence regarding the explicit and detailed requirements in § 301 and § 306 cannot create an exception to those sections' strongly-worded blanket prohibitions.

The defendants' interpretation would render § 301(e) and § 306(e) effectively meaningless. Courts strive to avoid interpreting a statute "in a manner that ren-

ders other provisions of the same statute inconsistent, meaningless, or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991), *quoted in Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1024 (9th Cir. 2005); *see also Ratzlaf v. United States*, 510 U.S. 135, 140–41, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994); *Watt v. Alaska*, 451 U.S. 259, 267, 101 S. Ct. 1673, 68 L.Ed.2d 80 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."). If the defendants were correct, the words "all" in § 301(e) and "any" in § 306(e)[9] would lose their meaning entirely.

There is a much simpler explanation for the difference in language between § 402 and § 404 than the defendants' proposed negative inference. If EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge. *See* 67 Fed. Reg. 31,129,

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[9] Section 301(e) provides: "Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to *all* point sources of discharge of pollutants in accordance with the provisions of this chapter." 33 U.S.C. § 1311(e) (emphasis added).

Section 306(e), which applies to new sources like the Coeur Alaska mine project, provides: "After the effective date of standards of performance promulgated under this section, it shall be unlawful for *any* owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316 (emphasis added).

31,135 (May 9, 2002); EPA/Corps, Joint Response to Comments 12 (May 3, 2002). Accordingly, the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation under § 301 or a standard of performance under § 306. Consequently, there was simply no need for Congress to enumerate § 301 or § 306 within § 404 because Congress never intended for § 404 to govern discharges subject to effluent limitations or performance standards. Rather, when a discharge is subject to an effluent limitation or performance standard, that discharge must comply with the NPDES program as required by § 402. *See* 67 Fed. Reg. at 31,135; 47 Fed. Reg. 54,598, 54,606 (Dec. 12, 1982). This construction of the statute preserves the full meaning of all of its provisions without rendering any provision superfluous or resorting to negative inferences and implied exceptions.

Additionally, although § 404 does not contain an explicit exception to effluent limitations or standards of performance, it does contain exceptions to other provisions of the Clean Water Act. Specifically, § 404(f) exempts discharges of dredged or fill material from certain activities from regulation under § 301(a), § 402, and § 404. 33 U.S.C. § 1344(f)(1). Discharges related to agricultural activities and road construction, among others, are exempted under § 404(f)(1). Mining is not listed as an exempt activity. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S. Ct. 1905, 64 L.Ed.2d 548 (1980). The defendants have produced no reason to believe that Congress intended additional exemp-

tions to be created later. Therefore, the lack of any explicit exception to § 301 and § 306 within § 404, and the lack of an exception for process wastewater from mines, is strong evidence that Congress did not intend one. *Id.* Even stronger evidence is Congress's insistence in § 404(f) that even the discharges from the enumerated activities continue to be subject to effluent standards. 33 U.S.C. § 1344(f).

Thus, the plain language of the Clean Water Act directly resolves the conflict between the regulatory definition of "fill material" and EPA's performance standard for froth-flotation mill operations. Pursuant to § 301 and § 306, EPA's performance standard for froth-flotation mills governs this situation. The language of § 404 does not lead to a contrary conclusion.

B.

Although the plain language of the Clean Water Act resolves the apparent regulatory conflict at the heart of this case, the regulatory history further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of "fill material" to replace the performance standard for froth-flotation mills. Courts consider contemporaneous explanations of regulations, such as those published in the Federal Register through notice-and-comment rulemaking, in order to determine an agency's intent. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714–16, 105 S. Ct. 2371, 85 L.Ed.2d 714 (1985); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 797 (9th Cir. 2003); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1189–90 (9th Cir. 2002); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 416–47 (4th Cir. 2003). And courts will not defer

to an agency's interpretation of a regulation that contradicts the agency's intent at the time it promulgated the regulation. *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 916, 163 L.Ed.2d 748 (2006); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L.Ed.2d 405 (1994); *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 627–28 (9th Cir. 2005); *see also Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997) (an agency's interpretation of a regulation is not entitled to deference where it is "plainly erroneous" or "inconsistent with the regulation") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L.Ed. 1700 (1945)). When the agencies promulgated the current definition in 2002, they foresaw and specifically addressed the potential conflict between the effects-based definition of "fill material" and performance standards already in place. To that end, the agencies explicitly stated that wastes subject to performance standards and effluent limitations would not be considered "fill material." The Corps' application of the fill rule in this case, therefore, contradicts its interpretation at the time the regulation was promulgated.

1.

Following its statutory obligation under § 301 and § 306, in 1982 EPA promulgated effluent limitations and standards of performance for sources within the category of ore mining. *See* 47 Fed. Reg. 25,682 (June 14, 1982) (proposed); 47 Fed. Reg. 54,598 (Dec. 3, 1982) (final). Within this category, EPA established a subcategory that applied to gold mining. *See* 40 C.F.R. §§ 440.100–440.104. For gold mines using the froth-flotation mill process, EPA promulgated a zero-discharge standard:

> Except as provided in paragraph (b)[2] of this section, there shall be *no discharge* of process waste-water to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores.

40 C.F.R. § 440.104(b)(1) (emphasis added); *see also* 47 Fed. Reg. at 25,697 (proposing zero discharge). EPA found that the zero-discharge standard was practicable because the majority of facilities existing at the time already achieved zero discharge through recycling and evaporation processes. 47 Fed. Reg. at 54,602. EPA promulgated this standard knowing that process wastewater discharges from froth-flotation mills contain a large amount of suspended solids that could otherwise qualify for regulation under § 404 pursuant to its effects-based definition of "fill material." *See* 47 Fed. Reg. at 25,685 ("Mill process wastewater is characterized by very high suspended solids levels (often in the percent range rather than milligrams per liter) . . . ."). In determining that a strict zero-discharge limit was appropriate, EPA determined that the best available control technology included the complete recycling of process wastewater. *See* 47 Fed. Reg. at 54,602. Given that the regulation facially applies to *any* discharge from a froth-flotation mill, and that it provides some limited exceptions that do not include "fill material," EPA intended for the prohibition to apply to discharges that would otherwise qualify as fill material under § 404. *See* 67 Fed. Reg. at 31,135. This conclusion is also supported by the fact that EPA promulgated the regulation notwithstanding its

definition of "fill material," which was identical to the definition used by both agencies today.

2.

The history of the current fill rule also demonstrates that both agencies intended for effluent limitations and performance standards to apply even to discharges that facially meet the definition of the term "fill material." The Clean Water Act does not define the term "fill material." Instead, Congress implicitly left that term to the Corps and EPA to define. *See Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1166 (9th Cir. 1998). As with most regulatory definitions, the agencies' definitions of "fill material" have evolved over time. In fact, prior to the current regulatory definition of "fill material," the Corps and EPA defined "fill material" differently. The Corps initially used an effects-based test, which defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose." 40 Fed. Reg. 31,320, 31,325 (July 25, 1975). EPA later adopted the identical definition. 40 Fed. Reg. 41,292, 41,298 (Sept. 5, 1975). Two years later, the Corps revised its definition and adopted a purpose-based test, which excluded from its definition "any pollutant discharged into the water primarily to dispose of waste." 42 Fed. Reg. 37,122, 37,145 (July 19, 1977). In adopting its purpose-based definition, the Corps explained that there were many waste materials "which technically fit within our definition of 'fill material' but which were intended to be regulated under the NPDES program." *Id.* at 37,130. EPA, in 1980, chose to keep its effects-based test. *See* 45 Fed. Reg. 33,290, 33,421 (May 19, 1980).

The agencies' differing definitions of "fill material" created a potential regulatory overlap. *See, e.g., Res. Invs.*, 151 F.3d at 1165–66, 1168–69 (acknowledging overlap); *Kentuckians*, 317 F.3d at 432 ("the Corps acknowledged that the differing approaches in defining 'fill material' employed by EPA and the Corps in their regulations had created some uncertainty about their interpretation of the Clean Water Act"). Many industrial wastes contain a high proportion of suspended solids and, therefore, have the effect of changing the bottom elevation of a body of water. As such, those wastes could have been considered fill material under EPA's definition. However, EPA continued to regulate many of those industrial wastes under § 402, and also continued to promulgate new effluent limitations and standards of performance for industrial pollutants with high concentrations of solids, regardless of their potential to raise the bottom elevation of a body of water. *See, e.g.*, 46 Fed. Reg. 8,260, 8,292 (Jan. 26, 1981) (regulating discharges of suspended solids from log-washing processes). Indeed, the new source performance standard for froth-flotation mills was adopted in 1982, despite the fact that waste from this process would have the effect of raising bottom elevation and, therefore, could otherwise constitute fill material under EPA's effects-based test. *See* 47 Fed. Reg. at 25,685. Thus, notwithstanding the potential regulatory overlap created by the agencies' differing definitions, EPA regulated many industrial pollutants under § 402. The agencies formally adopted this practice in a Memorandum of Agreement on Solid Waste ("MOA")

in 1986. 51 Fed. Reg. 8,871 (Mar. 14, 1986). After adoption of the MOA in 1986, the Corps continually declined to exercise jurisdiction over mine tailings.[10]

In 2002, the agencies promulgated their joint regulation defining the terms "fill material" and "discharge of fill material." 67 Fed. Reg. at 31,130. The current regulatory definition of "fill material" provides:

> (1) Except as specified in paragraph (e)(3) of this section, the term "fill material" means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.

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10 *See, e.g.*, Memorandum from Col. John W. Pierce, U.S. Army Corps of Eng'rs, "Agency Jurisdiction over Certain Activities Connected with Mineral Extraction, Specifically Gold Mining, in Alaska" 1–2 (Apr. 14, 1992) ("The tailings behind the dam, however, are a waste product of the mining operation and are not under our jurisdiction according to the 1986 Memorandum of Agreement...."); Letter from Glen E. Justis, U.S. Army Corps of Eng'rs 2–3 (June 18, 1991) ("The Corps has neither special expertise [n]or jurisdiction by law to evaluate the impacts of the tailings discharge.... The tailings do not meet the Corps' definition of fill material.").

> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining[11] or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

33 C.F.R. § 323.2(e) (Corps' regulation); 40 C.F.R. § 232.2 (EPA's regulation) (emphasis added). The agencies also defined "discharge of fill material" as follows:

> The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: . . . placement of overburden, slurry, or tailings or similar mining-related materials . . . .

33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.[12]

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[11] "Overburden" is generally defined as rock or soil cleared away before mining. *See* EPA, *Terms of Environment*, http://www.epa.gov/OCEPAterms/oterms.html (May 14, 2007).

[12] The *amici* brief of 14 members of Congress argues persuasively that the adoption of these regulations by the Corps and EPA violates the purposes and plain language of the Clean Water Act by allowing waste material to be dumped into lakes, rivers, and other waters of the United

[Footnote continued on next page]

At the same time, however, the agencies made clear that they did not intend to change their long-standing practice, according to which EPA regulates discharges of pollutants for which it has established effluent limitations or standards of performance under the NPDES program.[13]

[W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines")

[Footnote continued from previous page]

States. SEACC bases its argument on a narrower ground pertaining to this particular mine. Thus, we do not reach the issue of the validity of these regulations.

[13] In *Kentuckians*, the Fourth Circuit recognized the Corps' prior practice of not regulating discharges subject to effluent limitations under § 404:

> [W]e conclude that the Corps' interpretation of "fill material" as used in § 404 of the Clean Water Act to mean all material that displaces water or changes the bottom elevation of a water body *except* for "waste"—meaning garbage, sewage, and *effluent that could be regulated by ongoing effluent limitations* as described in § 402—is a permissible construction of § 404.

317 F.3d at 448. The court also explained the Corps' prior position that it was not authorized to regulate discharges subject to effluent limitations. *Id.* at 445.

promulgated under section 304[14] and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified wastestreams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.* Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs.

67 Fed. Reg. at 31,135 (emphasis added). Additionally, in their Joint Response to Comments to the proposed rule, the agencies restated this position:

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[14] Sections 304 and 301 are interchangeable in this instance. Section 304 directs EPA in how to determine the degree of effluent reduction attainable under § 301. *Citizens Coal Council v. EPA*, 447 F.3d 879, 883 (6th Cir. 2006) (en banc) (citing 33 U.S.C. § 1314).

> Under today's rule, we will continue, consistent with our long-standing practice, to rely on the existence of effluent limitation guidelines or standards or a NPDES permit to inform the determination of how a particular discharge is regulated under the Act. If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa.

EPA/Corps, Joint Response to Comments 30. In the same document, the agencies clarified that the new rule would not expand the jurisdiction of the Corps or permit previously prohibited discharges: "the suggestion that this rulemaking now provides a legal basis for previously illegal activities is not the case-no discharges that were previously prohibited are now authorized as a result of this rulemaking." *Id.* Thus, the agencies clearly intended to exclude discharges subject to effluent limitations or performance standards from the new definition of "fill material."

In fact, when the Corps and EPA first proposed the revised, coordinated definition in 2000, they included an explicit exemption from the definition of "fill material" for discharges subject to effluent limitations or standards of performance. *See* 65 Fed. Reg. 21,292, 21,299 (Apr. 20, 2000). The stated purpose of the exemption was to maintain the agencies' "current practice," which was "consistent with paragraph B.5 of the 1986 Solid Waste MOA." *Id.* at 21,297. Although the agencies removed the explicit exemption from the final rule, they did so only because commenters expressed concern that the exception was vague and would create uncertainty regarding

whether the reference to effluent guidelines applied prospectively or only to those guidelines already in existence at the time. *See* 67 Fed. Reg. at 31,135. As such, the agencies still intended to regulate discharges subject to effluent limitations and standards of performance under § 402.

The defendants attempt to undermine the clear intent of the agencies by focusing on a single sentence of the preamble in which the agencies stated "mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* The district court also relied on that one sentence. However, the defendants and the district court give far more weight to that singular statement than it deserves. It is difficult to understand why the agencies would painstakingly explain in the preamble that the new definition would not change their treatment of discharges subject to effluent limitations and standards of performance, only to completely contradict themselves two paragraphs later. The agencies themselves cleared up any potential confusion in their Joint Response to Comments:

> Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. *Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid.*

EPA/Corps, Joint Response to Comments 12. Thus, the current fill rule only applies to those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance.[15] The agencies could not have been more clear in articulating that this would be their preferred approach.

3.

In fact, the agencies followed that approach with Coeur Alaska for quite some time. The Corps consistently informed Coeur Alaska that discharges from its froth-flotation mill would not be regulated as fill material under § 404. At least, the agencies took that approach up until the time that the Corps granted the permit that led to this dispute. Prior to the promulgation of the current fill rule in 2002, the Corps relied on the 1986 MOA in informing Coeur Alaska that it lacked jurisdiction and expertise to permit discharges of tailings from the Kensington

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[15] The Fourth Circuit's holding in *Kentuckians* is consistent with our conclusion. In *Kentuckians*, the court addressed the issue of whether the Corps had authority under § 404 to permit valley fills from mountain-top coal mining "when the valley fills serve no purpose other than to dispose of excess overburden from the mining activity." 317 F.3d at 439. EPA had not promulgated a performance standard for mountain-top coal mining, so neither § 301 nor § 306 was implicated in that case. *Id.* at 445. Moreover, in that case, the Corps admitted that, under the 2002 definition, "it was authorized to regulate discharges of fill, even for waste, *unless the fill amounted to effluent that could be subjected to effluent limitations.*" *Id.* (emphasis added).

mine as "fill material." For example, in a 1998 ROD, the Corps made clear to Coeur Alaska that it "does not regulate the placement of tailings." U.S. Army Corps of Eng'rs, ROD 13 (Jan. 18, 1998). And as late as 2005, EPA informed Coeur Alaska that "[b]ecause this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project." EPA, ROD for § 402 NPDES Permit 3 (June 28, 2005) (citing 40 C.F.R. § 440.104). Therefore, in addition to the regulatory history, the agencies have an established record of refusing to regulate tailings discharged from Coeur Alaska's planned froth-flotation mill at the Kensington mine as fill material under § 404.

C.

The agencies' unequivocal statements regarding their intent not to override effluent limitations and standards of performance when they promulgated the current fill rule are dispositive and compel the conclusion that the Corps overstepped its authority in issuing a permit to Coeur Alaska under § 404. If the agencies actually did intend to repeal or create an exception to the performance standard for froth-flotation mills when they promulgated the current fill rule, they did not acknowledge or provide a satisfactory explanation for the change in course. When an agency decides to change course by rescinding or changing a rule, the agency "is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983). If an agency fails to comply with that obligation, the new rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is invalid under § 706(2)(A) of the APA. *Id.* at 41, 103 S. Ct. 2856 (citing 5 U.S.C. § 706(2)(A));

see also Bush-Quayle 92 Primary Comm., Inc. v. Fed. Election Comm'n, 104 F.3d 448, 453 (D.C. Cir. 1997). Not only did the Corps and EPA not acknowledge a change in course when they promulgated the fill rule, they actually stated the opposite intent. That is, the agencies made clear that effluent limitations and standards of performance would continue to apply. We could not have interpreted the fill rule as creating an exception to the performance standard for froth-flotation mills without the agencies complying with the APA by explaining their intent in the Federal Register and offering an opportunity for notice and comment. *See Motor Vehicle Mfrs.*, 463 U.S. at 42, 103 S. Ct. 2856.

D.

Finally, the performance standard governs because it is more specific. It is a basic principle of regulatory interpretation that a regulation dealing with a "narrow, precise, and specific subject is not submerged" by a later enacted regulation "covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L.Ed.2d 540 (1976), *cited in Cal. ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000). Unlike the fill rule, which pertains to fill material generally, the performance standard covers froth-flotation mills precisely. *See* 40 C.F.R. § 440.104. Consequently, the agencies' later promulgation of the more general fill rule cannot supersede the narrow, precise, and specific performance standard for froth-flotation mills.

E.

The Corps also issued a permit to Goldbelt, Inc., for construction of a marine terminal facility at Cascade Point and issued a ROD approving Goldbelt's plan of

operations. *See* U.S. Army Corps of Eng'rs, Permit to Goldbelt, Inc. (July 15, 2005); U.S. Army Corps of Eng'rs, Revised ROD 4 (Mar. 29, 2006). Goldbelt's permit and ROD are predicated on a mine design of which a critical component is Coeur Alaska's discharge of process wastewater into Lower Slate Lake. But for that mine design, the Cascade Point facility would be unnecessary. In fact, the Corps itself stated that "without Kensington mine, the Cascade Point facility would not be constructed in the foreseeable future." U.S. Army Corps of Eng'rs, Revised ROD 4. For that reason, the Corps considered the terminal a "component" of the Kensington project and analyzed the terminal proposal in the same Final Supplemental Environmental Impact Statement and Revised ROD as the Kensington project. *Id.* Indeed, Goldbelt must have had a "significantly protectable interest" relating to the subject of this case in order to intervene as a defendant, which it chose to do. *United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002); Fed. R. Civ. P. 24(a)(2). Importantly, in its motion to intervene, the company admitted that "Goldbelt's Cascade Point marine terminal is an integral part of the approved Plan of Operations, and may be constructed and used *solely* to service the Kensington Mine as contemplated in that Plan of Operations." Goldbelt further admitted that "[a]ny ruling by this Court that delays or disrupts construction of the mine will leave Goldbelt with a 'permitted' facility that either it cannot build or cannot be operated once built because the condition precedent of Goldbelt's permits is construction and operation of the Kensington Mine as contemplated in the challenged Plan of Operations." Consequently, Goldbelt's permit and ROD are critically premised on Coeur Alaska's § 404 permit. Because that permit is inva-

lid, the Corps' permit and ROD for the Cascade Point facility should be vacated.

F.

Under the APA, the normal remedy for an unlawful agency action is to "set aside" the action. 5 U.S.C. § 706(2). In other words, a court should "vacate the agency's action and remand to the agency to act in compliance with its statutory obligations." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005), *cert. granted*, --- U.S. ----, 127 S. Ct. 853, 166 L.Ed.2d 681 (2007); *see also Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). For the reasons discussed above, the Corps' permit for the discharge of process wastewater from the froth-flotation mill at the Kensington Gold Mine into Lower Slate Lake violates § 301 and § 306 of the Clean Water Act. The Corps' permit for construction of a marine terminal at Cascade Point critically depends on the unlawful permit to Coeur Alaska. Consequently, we remand to the district court to vacate both permits, as well as the RODs on which they are based.

V.

In conclusion, we reverse the district court, remand to the district court to vacate the permits issued to Coeur Alaska and Goldbelt, and vacate the RODs that approved Coeur Alaska's and Goldbelt's plans of operations. The Corps violated the Clean Water Act by issuing a permit to Coeur Alaska for discharges of slurry from the froth-flotation mill at the Kensington Gold Mine. EPA's performance standard for froth-flotation mills, promulgated pursuant to § 301 and § 306 of the Clean Water Act, prohibits discharges from such operations into the navigable waters of the United States. No exceptions are provided by either the regulation or the statute. Even though the dis-

charge in this case facially qualifies for the permitting scheme under § 404 of the Clean Water Act because it will change the bottom elevation of Lower Slate Lake, the discharge is nevertheless prohibited by the clearly applicable and specific performance standard. The plain language and structure of the Clean Water Act demonstrate that EPA's performance standard governs in this case. Also, the agencies' statements made during promulgation of the regulation defining "fill material," as well as their statements made to Coeur Alaska during the lengthy permitting process, indicate that they intended this result.

Thus, the district court erred in granting summary judgment in favor of the defendants. The case is remanded to the district court for action pursuant to this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendants-Intervenors-Appellees.	No. 06-35679 D.C. N CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

The panel has voted to deny the Federal Appellees' Petition for Limited Panel Rehearing.

Judge Graber has voted to deny the petitions for rehearing en banc of Intervenor-Appellee Goldbelt, Inc., Intervenor-Appellee Coeur Alaska, Inc., and Appellee State of Alaska. Judge Hug and Judge Tashima have voted to recommend denial of the petitions for rehearing en banc.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION COUNCIL; SIERRA CLUB; and LYNN CANAL CONSERVATION,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL TIMOTHY J. GALLAGHER, in his official capacity as District Engineer; LARRY L. REEDER, in his official capacity as Chief of the Regulatory Branch; JOHN C. LEEDS, III, in his capacity as manager of the Juneau Field Office; GLEN E. JUSTIS, in his capacity as Chief of the East Section; DOMINIC IZZO, in his official capacity as Prin-

No. 1:05-cv-00012-JKS

MEMORANDUM DECISION

[Re: Motions at Dockets 41 and 80]

cipal Deputy Assistant Secretary of the Army (Civil Works); and UNITED STATES FOREST SERVICE,

Defendants,

and

COEUR ALASKA, INC.; STATE OF ALASKA; and GOLDBELT, INC.,

Defendant-Interveners.

I. PROCEEDINGS

Plaintiffs Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation appeal the decision of the U.S. Army Corps of Engineers ("Corps") decision to grant permits to Coeur Alaska, Inc. and Goldbelt, Inc, under § 404 of the Clean Water Act ("CWA").[1] Plaintiffs seek to vacate the § 404 permits, Record of Decision and plan of operations, and permanently enjoin the Corps and Forest Service from allowing any activities authorized by the vacated permits, ROD, and plan of operations. At Docket No. 41 Plaintiffs have moved for summary judgment. At Docket No. 80 the Federal Defendants have opposed the motion and cross-

[1] 33 U.S.C. § 1344.

moved for summary judgment in their favor.[2] At Docket Nos. 61, 67, and 71, respectively, Interveners Goldbelt, Inc., State of Alaska, and Coeur Alaska, Inc. have filed oppositions to Plaintiffs' motion. City and Borough of Juneau and Berners Bay Consortium have filed amici briefs in opposition to Plaintiffs' Motion at Docket Nos. 88 and 92, respectively. At Docket No. 97 Southeast Conference has filed an amicus brief in support of the Plaintiffs' motion. Plaintiffs have replied to the opposition.

At Docket Nos. 83 and 86 Intervener Coeur Alaska and the Federal Defendants have requested oral argument. The Court having reviewed the moving papers, oppositions, and amici briefs has determined that oral argument would not assist the court in deciding the motions. The requests for oral argument are DENIED.

II. BACKGROUND[3]

The permit granted Coeur Alaska allows it, as the operator of the Kensington Mine, to discharge approximately 210,000 gallons per day of tailings remaining after gold ore is processed using the "froth-flotation process" as "fill material" directly

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[2] For convenience, the named defendants are referred to collectively as "Federal Defendants."

[3] The background and history of this case are well known to the parties and, in the interests of brevity, will not be replicated here except as necessary to an understanding of the Court's decision.

into Lower Slate Lake. The lake will be utilized as a storage facility impounding the tailings.[4]

After the ore is extracted from the ground, it will be processed through crushing, grinding, flotation, thickening and filtration.[5] After the ore is crushed and ground, it is fed to the flotation tanks in slurry form, where air, conditioners and frothing agents will be added to cause the gold-bearing minerals to attach to air bubbles at the top of the tank.[6] The gold-bearing froth is then skimmed off and further concentrated in additional flotation tanks.[7] Most of the chemicals added to the system will stay in the flotation tanks or be removed with the flotation concentrate, not discharged with the tailings.[8] Similarly, most of the other metals will be removed from the system along with the gold concentrate, not discharged with the tailings.[9] Following the final flotation, the ore concentrate is dewatered and placed in specialized, sealed marine transport containers for shipment to a facility outside Southeast Alaska for further processing.[10] No cyanide processing will take

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4 Agency Record ("AR"), Vol. 8, 003328.

5 AR Vol. 8, 003360–61; *see also* Vol. 1, 000021.

6 AR Vol. 8, 003360–61.

7 *Id.*

8 *Id.*

9 *Id.*; *see also* AR Vol. 1, 000005.

10 AR Vol. 1, 000005; Vol. 8, 003360–61.

place at the Kensington Mine or elsewhere in Southeast Alaska.[11]

"Tailings" are the solid material left in the bottom of the flotation tanks after the gold-bearing material has been removed.[12] Using "high-grade" mine operations, approximately 40% of the tailings should be backfilled to the mine, leaving approximately 4.5 million tons of tailings to be discharged into the Lower Slate Lake impoundment.[13] The tailings will be combined with liquid in a slurry and transported through a 3.5 mile, double-walled, high-density polyethylene pipeline approximately 6 inches in diameter to the lake impoundment.[14] The solid component of the slurry (*i.e.*, the tailings) will comprise approximately 55% of the slurry. Before the tailings slurry leave the mill, a polymer and flocculant will be added to agglomerate the smaller tailings and enhance settling of the tailings once they are deposited into the lake impoundment.[15] The tailings slurry is to be discharged from the bottom of the submerged pipe and through perforations in that pipe, which will be moved periodically to ensure equal distribution of the tailings.[16] The tailings will

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[11] AR Vol. 1, 000005, 000021.

[12] AR Vol. 8, 003362.

[13] AR Vol. 1, 000007; Vol. 8, 003358, 003362, 003367.

[14] AR Vol. 8, 003364.

[15] *Id.* The added materials are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the settling of the fine material.

[16] *Id.*

be placed at a depth that would prevent remobilization of the tailings.[17] Upon closure of the mine, the tailings will fill the lake to its current ordinary high water mark, thus reaching a depth of approximately 50 feet.[18] At that time, the lake will have grown to approximately 62 acres from its current size of 23 acres, and will be approximately 33 feet deep over the top of the tailings.[19] The discharge of tailings to the lake impoundment is limited to the pre-specified volume of 4.5 million tons.[20] The tailings must also be tested quarterly to ensure that there are no significant deviations from the original tailings analysis that might affect monitoring, closure requirements, water quality or any other permit condition.[21]

It is anticipated that most aquatic life in Lower Slate Lake will be lost during mining operations, primarily due to being covered with the discharged material.[22] Tests on the tailings show that they will not generate an acid discharge or metals leachate.[23]

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17 AR Vol. 1, 000022.

18 AR Vol. 1, 000013; Vol. 8, 003453.

19 AR Vol. 1, 000013. The increased lake area at closure is expected to consist of approximately 47 acres of deep-water habitat and 15 acres of shallow-water habitat. The 15 acres of shallow-water habitat is expected to convert over time to wetlands or vegetated shallows.

20 *See* AR Vol. 1, 000068; Vol. 13, 006285.

21 AR Vol. 1, 000022, 000067–68.

22 AR Vol. 1, 000021–22; Vol. 8, 003575.

23 AR Vol. 1, 000030.

While the pH around the discharge pipe is expected to be toxic to the aquatic environment, it is anticipated this will dissipate very rapidly.[24] Reclamation of the 62-acre lake, including capping of the tailings, is required as part of the project.[25] As a result, it is expected that the lake would recover over time, and would provide at least equivalent aquatic habitat and productivity as it does currently.[26] This includes habitat for Dolly Varden char and other aquatic organisms.[27]

Mid-Lake East Fork Slate Creek, an upstream tributary of Lower Slate Lake, will be diverted around the lake impoundment by a pipeline.[28] Further, a "reverse osmosis" water treatment system will be constructed to remove solids and metals from the lake impoundment water before any of that water is allowed to enter downstream waters.[29] The treated water will be transported from the treatment plant to the diversion pipeline, and then flow via a spillway to East Fork Slate Creek, downstream of the lake, eventually joining Slate Creek and entering

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[24] AR Vol. 1, 000022.

[25] AR Vol. 1, 000013, 000015, 000022–23. A reclamation bond on the operation is being held to ensure that the lake is reclaimed in accordance with the approved plans. *See* AR Vol. 1, 000005.

[26] AR Vol. 1, 000022–23; Vol. 8, 003573–76.

[27] AR Vol. 1, 000022–23, 000069; Vol. 8, 003573–76.

[28] AR Vol. 8, 003367.

[29] AR Vol. 1, 000015; Vol. 8, 003367.

Berners Bay.[30] Discharges of the treated water from Lower Slate Lake are subject to a CWA § 402 NPDES permit and must meet state water quality standards.[31]

The overall impact of the project permitted by the Corps and EPA is to convert Lower Slate Lake into a temporary settling pond for the disposal and treatment of the tailings generated by the mining operations at the Kensington Mine. Broadly stated, the project entails; (1) isolating Lower Slate Lake from the rest of the drainage system, (2) using the lake as a tailing storage facility impounding the tailings, and (3) restricting the release of water into the downstream drainage system to that which meets the requirements of § 402. The adverse impact, primarily the destruction of aquatic life, is expected to be limited to Lower Slate Lake. At the termination of the mining operations, restoration of the lake as an aquatic resource is expected to occur.

III. ISSUES

Plaintiffs contend that the permitting process involved in this case was governed by the more

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[30] *Id.*

[31] AR Vol. 1, 000005. The State agreed in its CWA § 401 certification that the water discharged from the tailings disposal facility (Lower Slate Lake) to East Fork Slate Creek, which was permitted under a CWA § 402 NPDES permit, would meet state water quality standards. AR Vol. 2, 001101. Plaintiffs do not challenge the issuance of this permit.

stringent requirements of § 402 of the CWA,[32] not § 404. At the heart of the controversy are the regulations defining "fill material." The Environmental Protection Agency ("EPA") and the Corps use the same definition.[33]

> (e) (1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

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[32] 33 U.S.C. § 1342.

[33] 33 C.F.R. § 323.2(c) (Corps); 40 C.F.R. § 232.2 (EPA). [Note: The quoted provision is the Corps' regulation; the definition in the EPA regulations is identical except that the definitions are not set forth in separate subdivisions.]

Also relevant is the definition of "discharge of fill material," defined as:[34]

> (f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; *placement of overburden, slurry, or tailings or similar mining-related materials*; and artificial reefs. The term does not include plow-

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[34] 33 C.F.R. § 323.2(f) (Corps); 40 C.F.R. § 232.2 (EPA) (emphasis added).

> ing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See §323.4 for the definition of these terms). See §323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

Plaintiffs contends that either: (1) in issuing the permit, the Corps misapplied the regulations; or (2) if the regulations were properly applied, the regulations are invalid as contrary to the CWA.[35] The real crux of the question before this Court is: Under § 404, may the Corps authorize the use of waters of the United States as a settling pond? For the reasons stated below, the Court holds that it may.

IV. STANDARD OF REVIEW

This Court in reviewing an agency decision may set it aside if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] It is self-evident that an

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[35] The Court notes that Plaintiffs also challenges the granting of the permit on the grounds that it does not meet the requirements of the several sections of the CWA, *e.g.*, §§ 306(e) and 311(e). This argument must be rejected. If the permit was properly issued under § 404, those provisions of the CWA are inapplicable. The applicable standard to be applied are the guidelines promulgated by the EPA based on criteria specified in 33 U.S.C. § 1343(c). *See also* 33 C.F.R. 323.6(a). If the permit was not properly issued under § 404 it is invalid in any event and the argument of Plaintiffs moot.

[36] 5 U.S.C. § 706(2)(A).

agency decision based upon an invalid regulation or the misapplication of a regulation is "otherwise not in accordance with law."[37]

In determining the validity of agency regulations, this Court must apply the rule established by the U.S. Supreme Court in *Chevron*.[38]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.* * * * [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

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[37] *See, e.g., Regents of the Univ. of California v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985) (invalid regulation), *overruled on other grounds by Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993); *Alaskan Trojan P'ship v. Gutierrez*, 425 F.3d 620, 627–628 (9th Cir. 2005) (agency interpretation of its own regulations)

[38] *Chevron v. NRDC*, 467 U.S. 837, 842–843 (1984) (footnote omitted)

The Supreme Court has, however, placed a limitation on the application of *Chevron*.[39]

> Deference in accordance with *Chevron*, however, is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Otherwise, the interpretation is entitled to respect only to the extent it has the power to persuade.

When reviewing the interpretation of agency regulations, courts must give substantial deference to an agency's interpretation of its own regulations.[40] This Court "must defer to the [Administrator's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the [Administrator's] intent at the time of the regulation's promulgation."[41]

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[39] *Gonzales v. Oregon*, 546 U.S. ___, ___, 126 S. Ct. 904, 914–915 (2006) (citations and internal quotation marks omitted).

[40] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted).

[41] *Id.* (internal quotation marks and citation omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (citations and internal quotation marks omit-

[Footnote continued on next page]

IV. DISCUSSION

The CWA divides the permitting process into two segments. In general, permitting for the discharge of effluents is vested in the EPA, the granting of which must meet strict standards.[42] Congress has, however, carved out an exception, vesting primary permitting authority in the Corps for the disposal of "dredged or fill material" into navigable waters at specified disposal sites.[43] The standards to be applied for the issuance of these permits is determined in accordance with guidelines developed by the EPA in conjunction with the Corps, and are significantly less stringent.[44]

Turning first to the issue of the validity of the regulation. Congress has clearly and unequivocally delegated authority to the EPA to issue regulations necessary to carry out its functions under the

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[Footnote continued from previous page]

ted); *Wards Cove Packing Co. v. NMFS*, 307 F.3d 1214, 1218 (9th Cir. 2002) ("An agency's interpretation of regulations it is charged with administering is entitled to a high degree of deference and will be upheld as long as it is not plainly erroneous or inconsistent with the regulation.") (citations omitted).

[42] 33 U.S.C. § 1342(a).

[43] 33 U.S.C. § 1344(a).

[44] 33 U.S.C. §§ 1344(b)(1), 1343(c). The guidelines are promulgated in 33 C.F.R. Part 230. Plaintiffs do not contends that the permit issued to Coeur Alaska does not meet these guidelines.

CWA.[45] As noted above, one of the functions of the EPA is to develop guidelines, in conjunction with the Corps, for use in guiding the Corps in processing permits under § 404.[46] In the case at bar, it is undisputed that Congress has not defined the term "fill material," thereby leaving its definition to the EPA, which the EPA did using the rule-making process of the Administrative Procedures Act. Accordingly, this Court must give Chevron-type deference to the EPA's definition of "fill material" and "discharge of fill material."[47]

Plaintiffs argue that the regulations are invalid because they do not comply with the "expressed intent of Congress." Specifically, that because they do not comply with standards promulgated by the EPA, they are contrary to § 306(e) of the CWA.[48] Plaintiffs' argument on this point is not persuasive. Plaintiffs do not specify which standard of performance is violated by these regulations, which simply define what constitutes fill material within the scope of § 404. This Court cannot say that the definition of fill mate-

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[45] 33 U.S.C. § 1361(a) ("the Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.").

[46] 33 U.S.C. § 1344(b)(1).

[47] *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 316 F.3d 916, 921 (9th Cir. 2003).

[48] 33 U.S.C. § 1316(c) ("After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.").

rial contained in the regulations promulgated by the EPA and Corps is not a permissible construction of the statute. the Agency could reasonably conclude that its definition is consistent with the distinction Congress sought to make between § 402 and § 404.

Turning to the interpretation of the regulation and its application in this case. First, the Court notes that it is uncontested that the slurry to be discharged into Lower Slate Lake will "change the bottom elevation" of the lake. Thus, it at least facially falls within the definition of "fill material" contained in the regulations. Plaintiffs do not dispute this. Plaintiffs argue that the inclusion of mine tailings within the definition of "fill material" is contrary to the agencies' intent at the time the regulations were promulgated. Plaintiffs' argument is essentially predicated upon the point that at the time the regulations were amended in 2002, the statement accompanying the notice of adoption of the final rule made clear that there was no intent to include mine tailings as "fill material" or "discharge of fill material."[49] The provisions cited by Plaintiffs taken alone and in isolation would support a finding of a clear indication by the EPA and Corps that the interpretation advanced by Plaintiffs is correct. However, Plaintiffs overlook or ignore other statements included in the adoption statement that contradict Plaintiffs' position. Specifically:

> Today's final rule also includes several clarifying changes to the term "dis-

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[49] Quoting various excerpts from 67 Fed. Reg. 31,129 – 31,143 (May 9, 2002).

> charge of fill material." Specifically, the term "infrastructure" has been added in several places following the term "structure" to further define the situations where the placement of fill material is considered a "discharge of fill material." In addition, the phrases "placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills" and "*placement of overburden, slurry, or tailings or similar mining-related materials*" have been added to the definition of "discharge of fill material" *to provide further clarification of the types of activities regulated under section 404.*[50]

and,

> *The language in today's final rule will clarify that any mining-related material that has the effect of fill when discharged will be regulated as "fill material."* We made this clarification because it was clear from the comments that some were reading the examples we identified as an exclusive list. The general intent of this rule is to cover materials that have the effect of fill, not simply to focus on any one industrial activity. We believe that the additional mining related examples will address

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50 *Id.*, 31,130 (emphasis added).

> the confusion reflected in the comments. Finally, as discussed in section II.B.1.c of this preamble, we do not agree that the CWA contains a blanket prohibition precluding discharges of "waste" materials in to waters of the U.S. Instead, the Act establishes the framework for regulating discharges into waters and we believe the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials.[51]

Contrary to the arguments of Plaintiffs, the interpretation of the regulations in this case is not contrary to the intent of the EPA Administrator at the time she adopted the regulations in question. While Plaintiffs may offer another plausible interpretation of the regulations in question, that interpretation is not the only reasonable interpretation of the regulation and does not compel this court to strike down the Corps' different interpretation.[52] Congress has deemed it appropriate to delegate to the Administrator of Environmental Protection Agency and the Secretary of the Army to coordinate their respective jurisdictions under the Clean Water Act. This they have done by duly adopted regulations to which this Court must defer. The Corps properly issued the permit to Coeur Alaska, Inc. under § 404 of the Clean Water Act.

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[51] *Id.*, 31,135 (emphasis added).

[52] *Akootchook v. United States*, 271 F.3d 1160, 1167 (9th Cir. 2001).

Plaintiffs also seek to set aside the permit issued to Goldbelt, Inc. to construct a marine terminal facility. As a basis for this action, Plaintiffs rely on the assumption that Coeur Alaska's § 404 permit will be revoked and, therefore, the need for the marine terminal facility becomes moot. As the Court has held that the permit to Coeur Alaska was properly issued, there is no basis for granting the relief requested as to Goldbelt, Inc. The same rationale applies to the ROD issued by the Forest Service.

VI. CONCLUSION/ORDER

Based upon the foregoing, Plaintiffs' Motion for Summary Judgment at Docket No. 41 is **DENIED**; and the Cross-Motion for Summary Judgment filed by the Federal Defendants at Docket No. 80 is **GRANTED**.

IT IS HEREBY ORDERED THAT the complaint be, and it hereby is, **DISMISSED**, with prejudice.

The Clerk of the Court to enter judgment accordingly.

Dated at Anchorage, Alaska, this 3rd day of August 2006.

s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: GOODWIN and REINHARDT, Circuit Judges.

Appellants' motions to file an over-length motion and over-length reply are granted. The Clerk shall file the emergency motion for an injunction pending appeal and the reply in support of that motion received herein on August 10, 2006 and August 22, 2006, respectively.

Appellee Coeur Alaska, Inc.'s motion to strike appellants' emergency motion for injunctive relief is denied.

Appellants' motion for an injunction pending appeal is granted, without bond. The U.S. Army Corps of Engineers, the U.S. Forest Service, and Coeur Alaska, Inc. are hereby enjoined from authorizing, allowing, or conducting any further construction activities relating to the use of Lower Slate Lake as a disposal site for mine tailings, including, but not limited to, cutting trees, building roads, clearing vegetation, excavating or filling wetlands, building dams or other structures, diverting streams, or altering the natural water level of Lower Slate Lake or the natural flow of East Fork Slate Creek, until further order of this court.

Nothing in this injunction shall prohibit measures needed to restore stream flows, stabilize soils, or prevent erosion.

Appellants' request for expedited briefing and hearing of this appeal is granted. The opening brief and excerpts of record are due September 12, 2006; the answering brief is due October 3, 2006; and the optional reply brief is due within seven days after service of the answering brief.

This appeal will be calendared before the first available panel in the week of November 13, 2006.

Filed: August 24, 2006

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Appellee Coeur Alaska, Inc.'s Urgent Motion Under Circuit Rule 27-3(b) to Vacate the Injunction Pending Appeal is denied. The court granted Appellant Southeast Alaska Conservation Council's ("SEACC") Emergency Motion Under Circuit Rule 27-3 on August 24, 2006, at which time the court is-

sued an injunction pending appeal. The court's order enjoined Coeur Alaska, the U.S. Army Corps of Engineers ("Corps"), and the U.S. Forest Service from activities relating to the construction of a disposal facility at Lower Slate Lake. On November 7, 2006, Coeur Alaska filed its motion to vacate the injunction due to weather conditions and in light of the U.S. Supreme Court's recent decision in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006).

We conclude that Coeur Alaska's challenge to the injunction, to the extent that it is based on *Purcell*, is untimely. *See* 9th Cir. R. 27-10(a). Even if the form of the injunction were subject to challenge now, we conclude that *Purcell* does not require the court to vacate its injunction. Thus, we confirm issuance of the injunction until the court decides the merits of this case and the mandate issues.

In *Purcell*, the Supreme Court vacated a "bare order" issued by this court that conflicted with a district court's later factual findings. *Id.* at 7–8. In that case, the Supreme Court stated that this court had failed "to provide any factual findings or indeed any reasoning of its own." *Id.* at 8. Coeur Alaska's remedy for failure of the injunction to meet *Purcell's* specificity requirement was, as was done in *Purcell* itself, to petition to the Supreme Court for *certiorari* relief, which Ceour Alaska did not do. Moreover, the Supreme Court gave no indication that this court could not have corrected the situation by offering a justification for its injunction at a later point: Accordingly, even if the court's injunction in this case was insufficient in its level of detail, we will remedy that lack of detail by explaining our reasons for granting the injunction.

An injunction pending appeal is appropriate in this case. In deciding whether to grant an injunction pending appeal, the court "'balances the plaintiff's likelihood of success against the relative hardship to the parties.'" *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1092 (9th Cir. 2005) (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). This court has recognized two different sets of criteria for preliminary injunctive relief. Under the "traditional test," the moving party must show: "'(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).'" *Id.* (quoting *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005)). The "alternative test" requires that the moving party demonstrate "'*either* a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.'" *Id.* (quoting 408 F.3d at 1120). As this court has explained many times, "'[t]hese two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum.'" *Id.* at 1092–93 (quoting 408 F.3d at 1120).

Applying this test, SEACC has demonstrated the need for an injunction pending appeal. First, SEACC has shown a likelihood of success on the merits because it has argued persuasively that the Corps' permit to Coeur Alaska violates the Clean Water Act.

Second, SEACC has demonstrated that construction of a permanent dam at Lower Slake Lake will adversely affect the environment by destroying trees and other vegetation, and by killing aquatic life. Coeur Alaska has not disputed these facts. Ongoing harm to the environment constitutes irreparable harm warranting an injunction. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). When a project "'may significantly degrade some human environmental factor,' injunctive relief is appropriate." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001) (quoting *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995)). Third, the balance of hardships favors SEACC. Coeur Alaska admitted to this court in its brief in response to SEACC's emergency motion for an injunction pending appeal that disposal of tailings into Lower Slate Lake is not scheduled to begin until, at the earliest, next spring. Consequently, construction activities need not begin immediately. Furthermore, as discussed below, the court's injunction allows Coeur Alaska to implement measures necessary to stabilize the coffer darn. Given the risk of irreparable harm to the environment, the balance of hardships tips decidedly in SEACC's favor. Finally, the public interest strongly favors preventing environmental harm. Although the public has an economic interest in the mine, there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation. Therefore, applying the court's sliding scale to the record, we conclude that an injunction pending appeal is appropriate in this case.

Our determination concerning the relative hardships does not conflict with that of the district court. When considering SEACC's motion for accelerated briefing to the district court relating to its motion for an injunction pending appeal, the district court stated that an expedited consideration of SEACC's motion for an injunction pending appeal was not warranted because no additional harm would occur if the court followed a normal briefing schedule. The district court did not actually consider the merits of SEACC's motion. In fact, the district court expressly did not address the balance of hardships. Thus, the district court's order merely addressed timing of briefing to the district court and did not make findings relevant to irreparable harm. SEACC's motion to the district court for an injunction pending appeal was withdrawn when this court granted SEACC's motion for an injunction pending appeal, and thus no findings on the merits were made.

To justify vacating the injunction (other than on the failure to comply with *Purcell's* specificity requirement), Coeur Alaska must demonstrate that facts have changed sufficiently since the court issued its order. *See Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Coeur Alaska argued in its motion that the court's injunction prevents it from taking measures to prevent environmental degradation. According to Coeur Alaska, excessive precipitation this autumn has jeopardized the integrity of a coffer dam constructed at the lake's outfall point, which could increase sediment levels in downstream waters. But the court's order granting SEACC's motion for an injunction pending appeal allows Coeur Alaska to take the steps necessary to prevent the alleged environmental harm. The court's order states: "Nothing in this injunction shall prohibit measures

needed to restore stream flows, stabilize soils, or prevent erosion." Accordingly, the injunction permits Coeur Alaska to take measures necessary to stabilize the coffer dam. Assuming Coeur Alaska's factual assertions to be true, Coeur Alaska has failed to demonstrate that construction of a permanent dam is the only measure capable of averting environmental harm. For example, Coeur Alaska could take several lesser measures to prevent breaching of the coffer dam, including installation of a spillway, or removal or reduction in height of the coffer dam itself. The court's order permits Coeur Alaska to take those measures. Thus, Coeur Alaska has not met its burden to show that the injunction should be vacated.

For these reasons, Coeur Alaska's urgent motion to vacate the injunction pending appeal is denied. The court directs all parties, including the government, to meet and consider how best to address the threat posed by weather conditions to the integrity of the coffer dam.

Filed: December 8, 2006

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Appellee's motion to stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari is GRANTED. The stay shall continue until final disposition by the Supreme Court.

Filed: November 14, 2007

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Our court, having granted the stay of mandate in this case, now grants the suggested alternative in appellants' motion and directs Coeur Alaska, Inc., the Army Corps of Engineers, and the Forest Service to prepare and approve a reclamation plan by no later than April 1, 2008. Any motion for an extension of the deadline must be timely made, indicate whether plaintiffs-appellants oppose or agree to the request, and fully justify any period of extension requested.

Filed: November 26, 2007

APPENDIX H

STATUTORY PROVISIONS INVOLVED

Section 301 of the Clean Water Act (Title 33 U.S.C. § 1311) provides, in relevant part:

§ 1311. Effluent Limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

. . . .

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

Section 306(e) of the Clean Water Act (33 U.S.C. § 1316(e)), provides:

§ 1316. National standards of performance

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 402 of the Clean Water Act (33 U.S.C. § 1342) provides, in relevant part:

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

Section 404 of the Clean Water Act (33 U.S.C. § 1344) provides in relevant part:

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

. . . .

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

OPPOSITION BRIEF

FILED
MAY 14 2008
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SUPREME COURT, U.S.

Nos. 07-984 and 07-990

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Army Corps of Engineers' authority to issue a permit for the discharge of dredge or fill material, pursuant to the statutory scheme that specifically addresses such material, is displaced by the Environmental Protection Agency's promulgation of an effluent limitation or new source performance standard pursuant to other provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, that address the discharge of pollutants generally.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 6
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 2, 11
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 10
Kentuckians for the Commonwealth, Inc. v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) 12
National Cable & Telecomms. Ass'n v. *Gulf Power Co.*, 534 U.S. 327 (2002) 7

Statute and regulations:

Clean Water Act, 33 U.S.C. 1251 *et seq.* 2
33 U.S.C. 1311 (§ 301) ..... *passim*
33 U.S.C. 1311(a) (§ 301(a)) 2, 9
33 U.S.C. 1311(e) (§ 301(e)) 10
33 U.S.C. 1312 (§ 302) 9
33 U.S.C. 1316 (§ 306) ..... *passim*
33 U.S.C. 1316(e) (§ 306(e)) 10
33 U.S.C. 1317 (§ 307) 9
33 U.S.C. 1328 (§ 318) 7, 9
33 U.S.C. 1342 (§ 402) ..... *passim*
33 U.S.C. 1342(a) (§ 402(a)) 7

Statute and regulations—Continued: Page

33 U.S.C. 1342(a)(1) (§ 402(a)(1)) 9
33 U.S.C. 1344 (§ 404) ..... *passim*
33 U.S.C. 1344(a) (§ 404(a)) 3, 7
33 U.S.C. 1344(b)(1) (§ 404(b)(1)) 3, 7
33 U.S.C. 1344(c) (§ 404(c)) 8
33 C.F.R.:
Section 323.2(e)(1) 3, 10
Section 323.2(f) 11
40 C.F.R.:
Pt. 230 3
Section 230.10(a) 3, 7
Section 230.10(b) 3, 8
Section 230.10(c) 3, 8
Pt. 440:
Section 440.104(b)(1) 4

Miscellaneous:

65 Fed. Reg. 21,293 (2000) 8
67 Fed. Reg. (2002):
pp. 31,129-31,130 3
p. 31,135 ..... 5, 6, 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 486 F.3d 638.[1] The opinion of the district court (Pet. App. 38a-64a) is unreported.

[1] All references to "Pet. App." are to the appendix filed in No. 07-984.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2007. A petition for rehearing was denied on October 29, 2007 (Pet. App. 36a-37a). The petitions for a writ of certiorari were filed on January 28, 2008, and January 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Clean Water Act (CWA or the Act), 33 U.S.C. 1251 *et seq.*, "the discharge of any pollutant by any person shall be unlawful" except "as in compliance with" specified provisions of the Act, including Sections 301, 306, 402, and 404 (33 U.S.C. 1311, 1316, 1342, and 1344). 33 U.S.C. 1311(a). The Act establishes two principal permitting programs for discharges: the National Pollutant Discharge Elimination System (NPDES), which is administered by the Environmental Protection Agency (EPA) and some States under Section 402 of the Act, 33 U.S.C. 1342; and a separate permitting program for discharges of dredge or fill material, which is administered primarily by the United States Army Corps of Engineers (Corps) under Section 404 of the Act, 33 U.S.C. 1344.

Section 402 states that, "[e]xcept as provided" in Section 404, EPA may issue NPDES permits for the discharge of any pollutant into navigable waters "upon condition that such discharge will meet" the requirements of other specified provisions, including Sections 301 and 306 of the Act, 33 U.S.C. 1311 and 1316. 33 U.S.C. 1342(a)(1). Section 301 requires EPA to promulgate effluent limitations, while Section 306 requires EPA to promulgate new source performance standards. 33 U.S.C. 1311, 1316.

Under Section 404(a), the Corps may issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Such permits must meet the requirements set forth in guidelines promulgated by EPA in conjunction with the Corps. 33 U.S.C. 1344(b)(1); see 40 C.F.R. Pt. 230. Those guidelines require, among other things, that the Corps deny a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a). The guidelines also generally preclude the issuance of a permit where state water quality standards or other specified standards are not met, or where the discharge would "cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. 230.10(b) and (c).

The Act does not define the term "fill material." In 2002, the Corps and EPA published a joint rule to "clarify the Section 404 regulatory framework" by adopting a uniform definition of "fill material." 67 Fed. Reg. 31,129-31,130. That rule defines "fill material" as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. 323.2(e)(1). The rule also defines the "discharge of fill material" to include the "placement of overburden, slurry, or tailings or similar mining-related materials." *Ibid.*

In 1982, EPA had promulgated a new source performance standard for gold mine operations that use a froth-flotation milling process. That standard requires,

in pertinent part, that "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process * * * for the beneficiation of * * * gold." 40 C.F.R. 440.104(b)(1).

2. The Corps issued a Section 404 permit to petitioner Coeur Alaska, Inc. (Coeur) for the discharge of mine tailings into the Lower Slate Lake that would result from the operation of the Kensington gold mine northwest of Juneau, Alaska. The gold would be mined through a froth-flotation process under which ore-bearing rock would be finely ground and processed in a tank with water and other substances, causing the gold to bubble to the surface and form a froth that would be skimmed off the top. Mine tailings are the solid material left in the bottom of a tank after gold-bearing material has been removed. The tailings would be transported in a slurry, consisting of about 55% tailings and 45% water, through a pipeline to an impoundment at Lower Slate Lake. Over the 10- to 15-year life of the mine, some 4.5 million tons of mine tailings would be deposited into Lower Slate Lake. Coeur would construct an impoundment dam at the lake. Upon closure of the mine, the discharges of mine tailings would have raised the bottom of Lower Slate Lake by an estimated 50 feet, and increased the surface area of the lake from 23 acres to approximately 62 acres. Aquatic life would then be restored to the lake. See Pet. App. 4a-7a, 40a-44a.

3. Respondents filed this action, contending that the Corps' issuance of the permit violated the discharge requirements of Sections 301 and 306 of the CWA, 33 U.S.C. 1311 and 1316, including the new source performance standard for froth flotation. Pet. App. 7a-8a.

The district court dismissed the complaint. Pet. App. 38a-56a. The court held that the Section 404 permitting

process is an "exception" to the NPDES permit process, and that the issuance of Section 404 permits for dredged or fill materials is governed by the implementing guidelines developed by EPA in conjunction with the Corps, not Sections 301 and 306. *Id.* at 51a. The court further determined that the slurry that would be discharged into the Lower Slate Lake is fill material under the Corps' and EPA's implementing regulation because it would "'change the bottom elevation' of the lake." *Id.* at 53a. While respondents argued that the agencies had not intended to include mine tailings in the definition of "fill material," the court rejected that contention, in part because the explanatory preamble specifically stated that "any mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* at 54a (emphasis omitted) (quoting 67 Fed. Reg. at 31,135). Because respondents did not contend that the permit failed to satisfy the Section 404 guidelines, *id.* at 51a n.44, the court upheld the permit, *id.* at 56a.

4. The court of appeals reversed. Pet. App. 1a-35a. It held that, "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." *Id.* at 17a. In the court's view, Sections 301 and 306 unambiguously prohibit all discharges contrary to the effluent limitations and performance standards promulgated thereunder, including discharges of dredge or fill material. *Id.* at 15a-17a. The court pointed principally to those provisions' use of the terms "any" and "all." *Id.* at 15a. The upshot, according to the court, is that EPA's promulgation of an effluent limitation or performance standard displaces the Corps' Section 404 permitting regime and

replaces it with EPA's NPDES permitting regime under Section 402. *Id.* at 17a-18a.

While the court of appeals relied on its view of the plain language of the statute, it also stated that the regulatory history "further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of 'fill material' to replace the performance standard for froth-flotation mills." Pet. App. 19a. The court recognized that, in promulgating the rule, the agencies had stated that "mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* at 29a (quoting 67 Fed. Reg. at 31,135). But the court relied on other statements indicating that no regulatory change was intended. *Id.* at 26a-27a.

ARGUMENT

Petitioners argue (*e.g.*, 07-990 Pet. 16-21) that the court of appeals erred in holding that, when "EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution," a permit for fill material may not be issued under Section 404. Pet. App. 17a. The government agrees that the court of appeals erred. There is, however, no division among the courts of appeals on that question. And while the question presented is important, it does not appear to be sufficiently important to warrant this Court's review at this time. Accordingly, the petition for a writ of certiorari should be denied. If this Court were to grant the petition, however, the government would support the position of petitioners.

1. The court of appeals erred in conflating the Act's two separate permitting mechanisms for the discharge of pollutants into waters of the United States. Sections 402 and 404 establish discrete permitting programs, go-

verning different discharges, subject to different protective requirements.

a. Under Section 404, the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters" when certain conditions are satisfied. 33 U.S.C. 1344(a). Thus, Section 404 specifically governs permits for the discharge of fill material. And the Act's conditions for issuance of a Section 404 permit do *not* include obtaining a Section 402 permit as well.

In contrast, Section 402 generally governs the permitting of *other* discharges by providing that, "*[e]xcept as provided in [S]ections [318 and 404]*, the Administrator may * * * issue a permit for the discharge of any pollutant, or combination of pollutants," under certain circumstances. 33 U.S.C. 1342(a). As that "except" clause reflects, the specific Section 404 permitting regime displaces the more general Section 402 NPDES permitting regime in the context of discharges of dredged or fill material. Indeed, it is a settled canon of construction that specific provisions generally govern over general ones. *E.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002).

That conclusion is confirmed by the specificity of, and differences between, the two permitting regimes. Section 404 requires that discharges of dredged or fill material comply with guidelines promulgated by EPA after consultation with the Corps. 33 U.S.C. 1344(b)(1). Those guidelines provide, among other things, that no discharge is permitted "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a). The guidelines also generally preclude the issuance of a per-

mit where state water quality standards or other specified standards are not met, or where the discharge would "cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. 230.10(b) and (c). The Act also authorizes EPA to prohibit the specification of any defined area as a disposal site, and to deny or restrict the use of any defined area as a disposal site for dredged or fill material. 33 U.S.C. 1344(c). In contrast, Section 402 requires that discharges comply with other specified provisions of the Act, including effluent limitations established under Section 301 and new source performance standards established under Section 306. 33 U.S.C. 1342(a)(1). Significantly, neither Section 404 nor the implementing guidelines require that discharges of dredged or fill material comply with the Section 301 effluent limitations or the Section 306 new source performance standards.

Those differences between the requirements for the discharge of dredged or fill material and the discharge of other pollutants reflect that, in general, there are practical differences between such discharges. As EPA and the Corps have explained, "[f]ill material differs fundamentally from the types of pollutants covered by [S]ection 402 because the principal concern is the loss of a portion of the water body itself." 65 Fed. Reg. 21,293 (2000). Considering the greater specificity of Section 404 with respect to dredged or fill material, the significant differences between the Section 402 and 404 permitting regimes, and the general differences in the types of pollution addressed by the two permitting regimes, it would make little sense to treat Section 402 as displacing Section 404 when EPA has issued a performance standard.

The court of appeals drew the opposite conclusion because the Act specifies elsewhere that, "[e]xcept as in compliance with [Section 301] and [S]ections [302, 306, 307, 318, 402, and 404] * * * the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. 1311(a). In the court's view, the use of the word "and" in that list means that all discharges of pollutants into waters of the United States must comply with all of the listed sections, including the effluent limitations of Section 301 and the new source performance standards of Section 306. See Pet. App. 15a.

That general list cannot bear the weight the court of appeals assigned it, in part because requiring compliance with all of the listed sections would logically require companies to secure *both* a Section 402 permit and a Section 404 permit, and thereby collapse the distinction between the two permitting regimes. Even the court of appeals did not go so far, and instead held that *only* a Section 402 permit could issue. Pet. App. 17a-18a. Nothing in the cumulative listing of statutory provisions suggests any modification of the respective terms of each of those provisions considered individually. Section 402 provides for EPA to issue permits "[e]xcept as provided in" Sections 318 and 404. 33 U.S.C. 1342(a)(1). Thus, the listing of Section 402 *includes* its exception for discharges approved by Section 404 and preserves the disparate treatment of the two types of discharges.

Moreover, use of the word "and" simply signifies that all of the sections identified in the list create exceptions to the general prohibition against discharges. In any event, even if the sentence's use of the term "and" were inartful, the term "or" would have been equally inartful. Under the court of appeals' approach to construing the

series of statutory provisions, the term "or" would have suggested, for example, that a discharge governed by Section 402 need only comply with Section 301 effluent limitations *or* Section 306 new source performance standards, which is contrary to Section 402's express requirement that both of those provisions must be satisfied by discharges that require a Section 402 permit. See 33 U.S.C. 1342(a)(1).

At the most, Congress's drafting creates an ambiguity in the Act. It does not unambiguously override the remainder of the Act's more specific provisions. Thus, the court of appeals erred by holding that the Act unambiguously precludes the agencies' reasonable interpretation, which is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984).[2]

b. The court of appeals also misperceived the regulatory history of the agencies' regulation defining "fill" material. See Pet. App. 19a-30a. That regulation defines "fill material" as material placed in waters of the United States that has the effect of "[r]eplacing any portion of a water of the United States with dry land," or "[c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. 323.2(e)(1). And of particular significance here, the rule specifically defines

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[2] Nor do Sections 301(e) and 306(e) shed light on the question. Section 301(e) states only that effluent limitations "shall be applied to all point sources of discharge *in accordance with the provisions of this chapter*.'" 33 U.S.C. 1311(e) (emphasis added). Because "provisions of this chapter" refers to the entire CWA, the court of appeals' reliance on that provision (Pet. App. 12a-13a) is circular. Similarly, Section 306(e) makes it unlawful to operate any new source "in violation of any standard of performance *applicable to such source*." 33 U.S.C. 1316(e) (emphasis added). To determine whether a performance standard is applicable to a source, one must again refer back to the Act as a whole.

the "discharge of fill material" as including the "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. 323.2(f). Those provisions contain no exception based on Section 301 effluent standards or Section 306 new source performance standards, nor do they state that discharges of fill material are subject to the Section 402 permitting process.

As the language of the rule is unambiguous, resort to its regulatory history is unnecessary. In any event, the preamble to the rule emphasizes that "mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" 67 Fed. Reg. at 31,135. The court of appeals discounted that statement, which is directly on point, and instead looked to a general statement that the rule does not "change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under [S]ection 402 of the CWA." Pet. App. 27a (emphasis omitted) (quoting 67 Fed. Reg. at 31,135). That language must be read, however, in conjunction with the preceding statement that "EPA has never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135. Accordingly, the regulatory history provides no basis for questioning the rule's plain language. In any event, the agencies' interpretation of their own regulation is entitled to deference. *E.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 460-462 (1997).

2. While the court of appeals erred, its decision does not conflict with any decisions of this Court or other courts of appeals. The court held that EPA's promulgation of an effluent limitation or new source performance standard displaces the Section 404 permitting process. See Pet. App. 17a-18a, 30a n.15. None of the cases relied

on by petitioners (*e.g.*, 07-990 Pet. 19-21) involves that circumstance. Indeed, the court of appeals distinguished *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) (relied on at 07-990 Pet. 19-21), precisely because "EPA had not promulgated a performance standard for mountain-top coal mining, so neither § 301 nor § 306 was implicated in [*Kentuckians*]." Pet. App. 30a n.15.

3. While the question presented is important, it does not appear to be sufficiently important to satisfy this Court's certiorari standards at this time. Theoretically, the question presented could arise in any context in which EPA had arguably promulgated a relevant effluent limitation or new source performance standard. A review of EPA's effluent limitations and performance standards suggests, however, that the issue will arise only in the context of mining operations that use certain technologies, especially the froth flotation process. Even for mines that use those technologies, the significance of the issue depends on the topography of the surrounding area, *i.e.*, whether fill material would need to be discharged into a water of the United States.

Thus, while the court of appeals' holding will have a significant impact on a number of mines, it is unclear how important the court's decision will prove to be. At least at this time, in the absence of a circuit split, this Court's review does not appear to be warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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BRIEF OF RESPONDENTS SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL., IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Army Corps of Engineers have authority under section 404 of the Clean Water Act to grant a "fill material" permit for an industrial process wastewater discharge that is prohibited by the Environmental Protection Agency's effluent limitations?

PARTIES TO THE PROCEEDINGS

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation concur in the statements of the Parties to the Proceedings in the petitions, except to note that Coeur Alaska, Inc., Goldbelt, Inc., and the State of Alaska were all intervenor-defendant-appellees in the court below.

RULE 29.6 STATEMENT

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT 4
REASONS FOR DENYING THE PETITIONS 10
I. THE ISSUES POSED BY THIS CASE DO NOT MERIT REVIEW BY THIS COURT. .. 11
A. The Ninth Circuit's Holding Does Not Conflict with Any Other Precedent. 12
B. The Decision Below Requires No Change in the Regulatory Practices Observed by EPA and the Corps for Decades. 14
II. THE NINTH CIRCUIT'S DECISION IS CORRECT. 16
A. The Plain Language of the Clean Water Act Requires that All Discharges Comply with Applicable Effluent Limitations. 16
B. The Ninth Circuit's Decision Adheres to the Authoritative Agency Interpretation Set Forth in the Federal Register 24
CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Glover Constr. Co.,
446 U.S. 608 (1980) 22

Chem. Mfrs. Ass'n v. Natural Res. Def. Council,
470 U.S. 116 (1985) 24

Chevron, U.S.A. v. Natural Res. Def. Council,
467 U.S. 837 (1984) 9

E.I. du Pont de Nemours & Co. v. Train,
430 U.S. 112 (1977) 3, 5, 17, 21, 22, 24

Florida Power & Light Co. v. Lorion,
470 U.S. 729 (1985) 9

Halverson v. Slater,
129 F.3d 180 (D.C. Cir. 1997) 18

Hillsborough County v. Automated Med. Labs., Inc.,
471 U.S. 707 (1985) 29

Kentuckians for the Commonwealth v. Rivenburgh,
317 F.3d 425 (4th Cir. 2003) 12, 13

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 31

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
127 S.Ct. 2518 (2007) 19

TABLE OF AUTHORITIES–Continued

Page

Rapanos v. United States,
547 U.S. 715 (2006) 2, 3, 13, 14

S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,
547 U.S. 370 (2006) 22-23

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 29

United States v. Mead Corp.,
533 U.S. 218 (2001) 29

United States v. Rutherford,
442 U.S. 544 (1979) 22

STATUTES

16 U.S.C. § 1536(a)(2) 19

Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") as amended:

§ 301(a), 33 U.S.C. § 1311(a) 17, 20

§ 301(b), 33 U.S.C. § 1311(b) 24

§ 301(c), 33 U.S.C. § 1311(c) 22

§ 301(e), 33 U.S.C. § 1311(e) 23

§ 301(h), 33 U.S.C. § 1311(h) 22

§ 301(i), 33 U.S.C. § 1311(i) 22

§ 301(m), 33 U.S.C. § 1311(m) 22

§ 301(p), 33 U.S.C. § 1311(p) 22

TABLE OF AUTHORITIES–Continued

Page

§ 302(b)(2), 33 U.S.C. § 1312(b)(2) 22

§ 306, 33 U.S.C. § 1316.....1, 5, 20

§ 306(a)(1), 33 U.S.C. § 1316(a)(1) 5, 16, 24

§ 306(a)(2), 33 U.S.C. § 1316(a)(2) 24

§ 306(e), 33 U.S.C. § 1316(e) 3, 5, 16, 17, 23

§ 309, 33 U.S.C. § 1319.....17, 21

§ 402(a)(1), 33 U.S.C. § 1342(a)(1) 20, 21, 22, 23

§ 402(b), 33 U.S.C. § 1342(b)..... 19

§ 402(k), 33 U.S.C. § 1342(k)..... 21

§ 402(*l*), 33 U.S.C. § 1342(*l*) 22

§ 404, 33 U.S.C. § 1344..... 1

§ 404(a), 33 U.S.C. § 1344(a).....17, 22

§ 404(f), 33 U.S.C. § 1344(f) 22

§ 404(p), 33 U.S.C. § 1344(p)..... 21

§ 502(11), 33 U.S.C. § 1362(11)..... 1

§ 505, 33 U.S.C. § 1365.....17, 21

LEGISLATIVE HISTORY

S. Rep. No. 92-414, at 58 (1971)..... 22

TABLE OF AUTHORITIES–Continued

Page

REGULATIONS

33 C.F.R. § 323.2(e) 2, 8, 25, 30, 31

33 C.F.R. § 323.2(f) 25, 30

40 C.F.R. § 122.3(b) 26

40 C.F.R. § 230.10 18

40 C.F.R. Part 405 31

40 C.F.R. Part 406 31

40 C.F.R. Part 411 31

40 C.F.R. Part 425 31

40 C.F.R. Part 429 31

40 C.F.R. § 440.100(a)(2) 17

40 C.F.R. § 440.104(b)(1) 1, 6, 25

ADMINISTRATIVE MATERIALS

42 Fed. Reg. 37,122, 37,145 (July 19, 1977) 6

47 Fed. Reg. 25,682, 25,685 (June 14, 1982) 31

47 Fed. Reg. 25,682, 25,688 (June 14, 1982) 5, 24

47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982) 5, 6, 24

51 Fed. Reg. 8,871, 8,872 (March 14, 1986) 6

67 Fed. Reg. 31,129, 31,131 (May 9, 2002) 29

67 Fed. Reg. 31,129, 31,135 (May 9, 2002) 9, 28, 32

TABLE OF AUTHORITIES–Continued

Page

COURT RULES

Supreme Court Rule 12.6 12

MISCELLANEOUS

City and Borough of Juneau, Press Release, *Coeur Alaska and Conservation Groups Will Ask USFS to Examine Alternative Site for Tailings Disposal, available at* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf (last visited April 28, 2008) 4, 10, 15

INTRODUCTION

For the first time in its history, the U.S. Army Corps of Engineers (Corps) issued a "fill material" permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344, for a wastewater discharge from a source subject to effluent limitations adopted by the Environmental Protection Agency (EPA). In effect, the Corps allowed a new mineral processing facility to escape a strict EPA no-discharge rule by labeling the wastewater discharge "fill material." This was a one-time departure from long established practice for the Corps, presenting an issue of first impression in the courts. The Ninth Circuit's decision requires no change to the agency's longstanding practice and thus has little practical consequence. Indeed, the Corps—the principal defendant below—chose not to file a petition for a writ of certiorari.

Since 1982, it has been illegal for new gold mills using the "froth-flotation" process to discharge process wastewater into lakes, rivers, and other navigable waters. Finding that other disposal methods were feasible and actually in use at most mines, EPA adopted a no-discharge standard for all new mills: "[T]here shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . ."[1] 40 C.F.R. § 440.104(b)(1).

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[1] This regulation is a "standard of performance" adopted under section 306 of the Clean Water Act. 33 U.S.C. § 1316. A performance standard is a specific type of "effluent limitation" applicable to new sources. 33 U.S.C. § 1362(11); State App. 13a n.8. This brief uses the term "effluent limitation" to encompass new source performance standards.

From that time until 2005, the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill—or from any other source subject to EPA effluent limitations—into navigable waters.

The 2005 permit at issue here would have authorized Coeur Alaska, Inc. (Coeur) to discharge 210,000 gallons per day of process wastewater from a new froth-flotation mill for the Kensington Gold Mine into 23-acre Lower Slate Lake, in the Tongass National Forest near Juneau, Alaska. The discharge would have killed all the fish and most other aquatic life in the lake. *See* State App. 5a-6a. The basis for the permit was that the discharge met the agencies' joint definition of "fill material." *See* 33 C.F.R. § 323.2(e)(1)(ii).

In their repeated assertions that the Ninth Circuit's decision departs from past practice, Petitioners and *Amici Curiae* overlook and sometimes misstate a critical distinction between the Kensington permit and every section 404 permit before it: While mines have frequently been permitted to construct tailings ponds for use as waste treatment facilities, the Kensington permit was the first to authorize the discharge of mining process wastewater into a navigable water. Petitioners and *Amici* are correct that the Corps has often issued section 404 fill material permits to build dams, diversions, roads, and other facilities needed to create tailings ponds. In the past, though, the agencies have viewed these manmade tailings ponds as non-navigable waste treatment facilities outside the jurisdiction of the Clean Water Act. *See generally Rapanos v. United States*, 547 U.S. 715, 723 (2006) (explaining that Clean Water Act prohibits discharges without a permit only to

"navigable waters"). Thus, they have never required mines to obtain any permits—neither wastewater permits under section 402 nor fill material permits under section 404—for discharges into tailings ponds. Here, by contrast, the agencies recognized that Lower Slate Lake is a navigable water, a fact not in dispute, precluding any discharges without a permit. *See id.* Nothing in the Ninth Circuit's decision changes anything about the agencies' past practice of permitting the construction of tailings ponds.

Because the Corps had never issued a permit like the one in this case, no previous court had addressed whether the Corps could issue a "fill material" permit for a source subject to EPA effluent limitations. Thus, there is no disagreement among the circuits on the issue. Nor does the Ninth Circuit's decision have significant adverse consequences for the mining industry or the economy. It simply requires the industry and the agencies to comply with the law as it has existed for at least 25 years.

Moreover, the Ninth Circuit decided the issue correctly. Section 306(e) of the Act is unambiguous and precludes the discharge. It states in its entirety: "After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e). This command applies to "any" new source, with no exceptions expressed or implied. This Court has held that the section 306 standards are "absolute prohibitions" precluding variances. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977). The Ninth Circuit confirmed its

plain language conclusion by noting that EPA and the Corps, when they adopted their joint definition of "fill material," clearly stated that they did not intend to authorize the Corps to issue permits for discharges subject to EPA effluent limitations. State App. 25a-29a.

Subsequent to the Ninth Circuit's decision, Coeur entered into discussions with the plaintiff conservation groups about alternative sites for tailings disposal that do not require discharging process wastewater into navigable waters. As a product of those discussions, Coeur has now submitted a proposal to the relevant agencies for approval. *See* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf. The availability of an alternative disposal site significantly reduces the importance of resolving the question presented in this case. Further, if the agencies replace the authorizations at issue here with new permits before decision by this Court, as requested by Coeur, this case will be moot.

STATEMENT

EPA adopted its 1982 regulations to determine the best means of disposing of the large volume of process wastewater, including tailings,[2] generated by

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[2] Coeur writes that the tailings slurry "contains some process water." Coeur Pet. at 8. This states the proposition backwards. As EPA uses the terms, the tailings are suspended solids contained within the process wastewater. *See* State App. 20a; *see also* ER 536 (EPA decision noting that standards "prohibit the discharge of process water (including mine tailings)."). The

(footnote continued...)

froth-flotation mills. In the froth-flotation process, a mill grinds large quantities of earth into fine particles and introduces water and chemicals to create a gold-bearing froth, which is removed for further processing. Left behind is a slurry of water, chemicals, and suspended solids. At the Kensington, about 40 percent of this slurry can be used as backfill in the mineshafts. State App. 4a. At issue in this case is what to do with the remainder.

The Clean Water Act directs EPA to adopt "standards of performance" for new sources of pollution. 33 U.S.C. § 1316. Performance standards must reflect the best available technology, including, where practicable, "a standard permitting no discharge of pollutants." *Id.* § 1316(a)(1). The Act permits no variances once a standard is adopted. *Id.* § 1316(e); *E.I. du Pont de Nemours & Co.*, 430 U.S. at 138.

Pursuant to this statutory mandate, EPA conducted a detailed study of the mining industry and determined that a "no discharge" standard was feasible for froth-flotation mills and actually in use at most existing mills. *See* 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982); 47 Fed. Reg. 25,682, 25,688 (June 14, 1982). The mining industry complained that this standard would be difficult to achieve in wet and mountainous areas (like southeast Alaska),

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(...footnote continued)
essential point, though, is undisputed: The Corps permit at issue authorizes the discharge of process wastewater from a froth-flotation mill into a navigable water.

"ER" refers to the Excerpts of Record, and "SER" to the supplemental excerpts, filed in the court of appeals.

but EPA rejected this argument. 47 Fed. Reg. at 54,602; *see* 40 C.F.R. § 440.104(b)(1).

Accordingly, for more than twenty years, the Corps never issued a permit to discharge mining process wastewater as fill material. In fact, until 2002, the Corps' definition of "fill material" explicitly precluded permits for such discharges. That definition applied only to discharges with the purpose, rather than merely the effect, of changing the bottom elevation of a water body. It specifically excluded discharges for the purpose of disposing of waste. 42 Fed. Reg. 37,122, 37,145 (July 19, 1977); *see* State App. 22a. EPA and the Corps adopted a Memorandum of Agreement in 1986 making explicit the understanding that wastewater discharges, including those from mining, would be subject to EPA permitting under section 402 of the Act and not to Corps jurisdiction under section 404. 51 Fed. Reg. 8,871, 8,872 ¶ B.5 (March 14, 1986); *see also* State App. 23a, 27a, 29a.

Amicus Curiae National Mining Association (NMA) asserts that two mines (Red Dog and Fort Knox) obtained section 404 permits for discharges into tailings ponds, NMA Br. at 10, but this is a misstatement of the record. Both mines obtained section 404 permits to *construct* tailings ponds, because placement of fill material was needed to create dams, diversions, roads, and the like. Neither mine obtained a permit, from either agency, to discharge tailings *into* the ponds. The agencies viewed the tailings ponds as waste treatment facilities, not navigable waters subject to permitting requirements under the Clean Water Act. The Corps stated explicitly in its decision document for the Fort

Knox mine, "No discharge of waste water to waters of the United States is expected...." SER 989. None of the Petitioners or *Amici Curiae* purport to cite even a single example of another mine that has obtained a section 404 permit to discharge mining process wastewater, and Respondents are not aware of any.

Guided by their longstanding interpretation of the law, the appropriate federal and state agencies in 1997 issued permits for a Kensington mining plan that would have authorized no discharge of process wastewater into navigable waters. Instead, Coeur proposed to dewater the slurry from the proposed new mill and dispose of the tailings in a dry facility on land. State App. 4a-5a. None of these permits or authorizations was challenged in court.

However, with the subsequent decline of gold prices, Coeur sought a cheaper way to dispose of the wastewater. This led to a revised mining plan, in which Coeur proposed to discharge the process wastewater from its froth-flotation mill directly into Lower Slate Lake. *Id.* at 5a.

Under this plan, Coeur would have constructed a dam 500 feet long and 90 feet high at the outlet of Lower Slate Lake to enlarge the lake enough to store all the waste. The mill would have discharged an average of 210,000 gallons containing 1,440 tons of tailings every day through a gravity-fed pipe from the mill to the lake. The wastewater discharge would have had a pH of 10 (about that of ammonia). Over the life of the mine, the discharge would have deposited 4.5 million tons of tailings, killing all the fish and most other aquatic life in the lake. *Id.* at 5a-6a. When Coeur ultimately closed the mine, it would have been required to place a cap of native

materials over the tailings on the bottom of the lake in an attempt to resolve toxicity concerns, *id.* at 7a, but "the extent to which aquatic life could be restored eventually is unclear." *Id.* at 6a.

EPA, the Corps, and the Forest Service disputed which disposal plan was environmentally preferable. EPA concluded that the 1997 dry tailings plan was feasible and environmentally preferable to lake disposal. ER 449-50. The Forest Service concluded that the two approaches were equally preferable. ER 395. The Corps was the only federal agency to conclude that discharge into Lower Slate Lake was the best alternative. ER 566.

The basis for the 2005 Corps permit authorizing this discharge notwithstanding the "no discharge" standard was that the wastewater discharge constituted "fill material" under a new definition of the term adopted jointly by EPA and the Corps in 2002. The new regulation defines "fill material" to include any discharge that has the effect of changing the bottom elevation of any portion of a water body. 33 C.F.R. § 323.2(e)(1)(ii). However, for decades EPA has regulated many industrial and municipal discharges containing solids that eventually settle to the bottom, thereby meeting the new definition of fill material. The new definition did not have the legal effect of shifting authority from EPA to the Corps for this broad category of discharges, nor did the agencies intend such a shift. They addressed confusion over this issue expressly in the Federal Register, explaining in some detail that EPA would continue to regulate such discharges and enforce its effluent limitations through permits under section 402 of the

Act. *See* State App. 25a-26a (quoting 67 Fed. Reg. 31,129, 31,135 (May 9, 2002)).

Contending that the 2005 permit violated the plain language of the Act and the EPA performance standard as well as the agencies' stated intent under the new fill material regulation, Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively "SEACC") promptly filed this lawsuit. In the district court, Coeur and the State of Alaska attached to their summary judgment briefs numerous documents that were not part of the administrative record, including permitting documents for the Red Dog, Fort Knox, and other mines. Dist. Ct. Docket 71, Exhs. 23-25; Docket 67, Exh. F. Petitioners submitted these documents in an attempt to establish some kind of precedent for the Kensington permit, but none of them included or referenced a section 404 permit authorizing a discharge of process wastewater into navigable waters. Because this gap effectively proved SEACC's point that the Corps had never previously granted such a permit, SEACC expressly waived objections to the extra-record submissions. *See, e.g.*, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (holding that judicial review is generally limited to administrative record).

The district court ruled in favor of the Corps, but the Ninth Circuit reversed. As required by step one of the *Chevron* test, *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984), the court of appeals first addressed whether Congress had spoken directly to the question presented. State App. 10a-11a. The court held that the plain language of the Clean Water Act prohibits the Corps

from issuing "fill material" permits for discharges subject to EPA effluent limitations. *Id.* at 14a-18a.

In an abundance of caution, the court also confirmed its conclusion under step two of the *Chevron* test, addressing the agencies' intended interpretation of the Act and of the regulations. *Id.* at 18a-19a. The court found that the agencies clearly and repeatedly stated that, in adopting a new definition of "fill material," they did not intend to exempt any discharges from EPA effluent limitations. *Id.* at 21a-30a.

Shortly after the court of appeals' decision, Coeur and SEACC entered into discussions mediated by the mayor of Juneau for the purpose of finding a tailings disposal site that would comply with the Clean Water Act. As a result of these discussions, Coeur agreed to pursue permits for a facility on the same upland site authorized in 1997. The new proposal would deposit the tailings as "paste" rather than in the dry form authorized in 1997, but still would not require any discharge of process wastewater into navigable waters. *See* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf. Coeur has submitted its proposal to the relevant agencies, who are actively reviewing it.

REASONS FOR DENYING THE PETITIONS

The decision below resolves a question of first impression for the courts: whether the Corps may use a section 404 permit to authorize a discharge of process wastewater that is prohibited by an EPA effluent limitation. The issue has not arisen before precisely because the Corps has not in the past pur-

ported to permit such discharges. Thus, the Ninth Circuit's decision does not conflict either in its holding or in principle with any prior federal decision. Nor does the decision impose significant adverse consequences on the mining industry or on communities or states with mines, because it changes nothing about the longstanding regulatory practice prior to the 2005 Kensington permit. There is therefore no important reason for this Court to consider the highly technical statutory questions posed by the application of the Clean Water Act to the unique factual circumstances of this case.

In any event, the decision below is correct. The Ninth Circuit properly applied *Chevron* steps one and two, finding, first, that the plain language of the Clean Water Act requires all discharges to comply with applicable effluent limitations and, second, that this was the explicit intent of the agencies when they adopted the 2002 joint definition of "fill material."

I. THE ISSUES POSED BY THIS CASE DO NOT MERIT REVIEW BY THIS COURT.

Despite their best efforts in the lower courts and their voluminous submissions to this Court, Petitioners and *Amici* remain unable to point to any previous instance where the Corps issued a section 404 permit for a wastewater discharge that would violate an EPA effluent limitation. The issues posed by this case have, therefore, never before been presented to any court for decision, and may never be presented again. Thus, what Petitioners are requesting is that the Court consider technical statutory and regulatory issues posed by an unusual Corps decision in the context of the unique factual circumstances of a

single proposed mine. There is no important reason for the Court to depart from its ordinary practice of denying plenary review in such a case, as the Corps' own decision not to seek review underscores.[3]

A. The Ninth Circuit's Holding Does Not Conflict with Any Other Precedent.

Contrary to Petitioners' assertions, the decision of the Ninth Circuit does not contradict decisions of any other court of appeals or of this Court. Before this case, no court had ever considered whether the Corps may issue a "fill material" permit for industrial or municipal discharges subject to EPA effluent limitations.

In particular, this question was not before the court in *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003), the principal appellate decision on which Petitioners rely. At issue there was "overburden," the unprocessed soil and rock that overlies a coal seam. *Id.* at 430. The Fourth Circuit's holding that the use of such solid material to fill valleys was permissible under section 404 by no means suggests that the Corps has authority to use section 404 to permit the discharge of wastewater to a navigable lake.

Indeed, the Fourth Circuit's analysis of the relationship between EPA and Corps authority not only

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[3] By obtaining an extension of time to file its response to the petitions, the Corps has also made clear that it does not support them. *See* S. Ct. R. 12.6 ("a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended").

does not conflict with the decision below, but actually supports it. The *Kentuckians* opinion noted that although EPA had adopted effluent limitations for some sources involved in coal mining, none of them was applicable to overburden. *Id.* at 445 (quoting EPA affidavit). The court highlighted, twice, the Corps' longstanding interpretation that discharges of waste subject to effluent limitations could not be permitted as "fill material" under section 404. *Id.* at 445, 448. The court upheld this position as a reasonable construction of both the Act and the Corps' 1977 regulations at issue in that case. *Id.* at 448.[4] Because the agencies stated a specific intent to continue this interpretation under the new fill rule adopted in 2002, and departed from it only when the Corps issued the Kensington permit, State App. 21a-30a, the Ninth Circuit's holding not only is consistent with *Kentuckians*, but follows from it.

Nor is there any conflict with this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* did not even remotely involve, let alone purport to decide, whether the Corps' section 404 permitting authority extends to discharges that are subject to EPA effluent limitations. The Court's general descriptive statements about section 404, plucked out of context, do not shed any light on the question presented here, still less establish a "conflict."

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[4] That *Kentuckians* involved the Corps' 1977 definition of "fill material," and not the 2002 definition at issue here, is another reason that its holding does not address the questions posed here.

At issue in *Rapanos* was whether certain wetlands were navigable waters, defined as "waters of the United States" in the Clean Water Act. *Id.* at 723, 729. Here, there is no dispute that Lower Slate Lake is a navigable water. A disputed question in *Rapanos*, irrelevant here, was whether the discharge of fill material into wetlands would eventually wash downstream to a navigable water body. Petitioners place great weight on the plurality's observation that fill material "typically" stays put and "normally" does not wash downstream. *Id.* at 744. This observation was not intended to define "fill material" or the dividing line between the section 402 and 404 permitting programs, but merely to describe a typical characteristic of fill. In fact, the plurality clarified this point in a footnote, *id.* n.11, in response to opinions questioning the observation from a majority of Justices. *See id.* at 774-75 (Kennedy, J., concurring) & 806-07 (Stevens, J., dissenting).

Beyond *Kentuckians* and *Rapanos*, Petitioners cite numerous cases for the undisputed proposition that the section 402 and 404 permitting programs are mutually exclusive. *See* Coeur Pet. at 22-23 & n.4; State Pet. at 19-20. As discussed below, nothing in the Ninth Circuit's decision suggests otherwise. *See infra* pp. 19-20. There is no conflict with these cases.

B. The Decision Below Requires No Change in the Regulatory Practices Observed by EPA and the Corps for Decades.

The Ninth Circuit's decision will not have any of the adverse economic impacts claimed by Petitioners

and *Amici*. It merely reinforces a legal requirement that both EPA and the Corps had understood and observed for decades before the 2005 Kensington permit: The Corps may not issue permits for discharges subject to EPA effluent limitations. The Kensington permit was a one-time aberration, and the Ninth Circuit's decision affects only that permit. As discussed above, Petitioners and *Amici* scoured the country in search of a prior instance in which the Corps granted such a permit and were not able to find even one.

In fact, the decision is not even likely to have an adverse effect on the jobs or economic benefits associated with the Kensington Mine. Coeur, with the cooperation of SEACC, has already begun the process of applying for permits consistent with the Ninth Circuit's decision. *See* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf. Although Coeur's new disposal plan does not yet moot this case—the agencies have not yet issued the replacement permits—it highlights the lack of importance of the question presented. The outcome of this case will likely determine not whether mining will take place at Kensington at all, but rather which of two economically viable forms it will take. More broadly, Coeur's ability to devise an acceptable alternative illustrates that the extravagant claims that the decision below will shut down mining throughout the mountain West are unfounded.

Finally, even if it were true that the application of the no-discharge standard rendered infeasible a large number of mines, an assertion unsupported by the facts, the problem would not result from any flaw

in the Ninth Circuit's reasoning. As will be shown below, the court's decision merely enforces the plain language of the Act ensuring that all new sources comply with EPA performance standards. If EPA's standard is really too strict, the agency has the power—even the responsibility—to modify it to ensure that it is "achievable" and "practicable." 33 U.S.C. § 1316(a)(1). Ensuring EPA's faithful implementation of the statute is a far better solution than contorting the statute to avoid compliance with an allegedly flawed standard.

II. THE NINTH CIRCUIT'S DECISION IS CORRECT.

A. The Plain Language of the Clean Water Act Requires that All Discharges Comply with Applicable Effluent Limitations.

Although Petitioners refer to claimed conflicts between the decision below and other appellate decisions, their fundamental contention is that the Ninth Circuit wrongly decided the case. Mere error correction, of course, is not this Court's function, but even if it were, this case would be a poor candidate for review because the decision below is demonstrably correct.

Section 306(e) of the Clean Water Act is a clear, unqualified prohibition: "[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e). It stands separately from both section 402 and section 404, and requires "any" operator of "any" new source to comply with "any" applicable performance standard. *Id.* Another section of the Act

separately specifies that "the discharge of any pollutant by any person shall be unlawful" except as in compliance with section 306 and other provisions. *Id.* § 1311(a). Violations of section 306 are enforceable separately from violations of sections 402 and 404. *Id.* §§ 1319(a)(3), (b) & (c), 1365(a)(1) & (f)(3). No provision of the Act contains any exception from section 306, for "fill material" or anything else. "It is clear that Congress intended these regulations to be absolute prohibitions." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) (reversing appellate court holding requiring EPA to adopt variances).

There is no dispute that the new froth-flotation mill at the Kensington Mine is a "source" to which the no-discharge standard is "applicable" under section 306(e). *See* 33 U.S.C. § 1316(e). The EPA standards specify that they "are applicable to discharges from . . . Mills that use the froth-flotation process . . . ." 40 C.F.R. § 440.100(a)(2). Section 306(e) thus prohibits the discharge of process wastewater from the new mill to Lower Slate Lake.

1. A critical but flawed premise of Petitioners' argument is that the prohibition of section 306(e) conflicts with section 404's authorization to grant fill material permits, requiring resort to interpretive rules to resolve the purported inconsistency. *See* Coeur Pet. at 25-26; State Pet. at 21-22. There is no such conflict. Section 306(e) is a categorical prohibition, while section 404 is merely a permissive grant of discretionary authority. *Compare* 33 U.S.C. § 1316(e) ("it shall be unlawful . . .") *with id.* § 1344(a) ("The Secretary may issue permits . . ."). A discretionary grant like that of section 404 is always

subject to other limits the law may impose, including, in this case, section 306(e).

The D.C. Circuit rejected an argument similar to that of Petitioners in *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997). There, as here, the defendants argued that interpreting "may" to include a prohibition would "transform 'may' into 'may not'." *Id.* at 187; *cf.* State Pet. at 21-22. The court easily disposed of this argument, noting that "[t]o say that 'may' is permissive does not lead to the conclusion that it permits *everything* . . . ." 129 F.3d at 187 (emphasis in original). "Rather, the word 'may' in [46 U.S.C.] section 2104(a) merely grants discretion to the Secretary, the limits of which are ascertained by reference to the section's other language, its structure and its purpose." *Id.* at 188. Here, section 306(e) is such a limit on the Corps' section 404 discretion.

Petitioners urge that the section 404(b) guidelines contain the only limits to the Corps' discretion, but this position is unsupported by the statute and contrary to the agencies' interpretation as stated explicitly in the guidelines themselves. The guidelines highlight this point with an unusual cautionary preface: "NOTE: Because *other laws may apply to particular discharges* and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement [sic] of these Guidelines will not automatically receive a permit." 40 C.F.R. § 230.10 (emphasis added). Section 306(e) and EPA's performance standards are certainly "other laws" that "apply to particular discharges."

The contrast between a prohibition and a grant of discretion distinguishes this case from *National Association of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007). That case required the Court to reconcile two apparently conflicting imperatives. Section 402(b) of the Clean Water Act provides that EPA "shall approve" a transfer application that meets specified criteria, while the Endangered Species Act provides that agencies "shall" consult with the Fish and Wildlife Service before taking agency action. *Id.* at 2531-32 (quoting 33 U.S.C. § 1342(b) and 16 U.S.C. § 1536(a)(2)). However, compliance with the latter requirement would effectively repeal or amend the former. *See id.* at 2532. This conflict left a "fundamental ambiguity that is not resolved by the statutory text," requiring the Court to consider the agency's interpretation. *Id.* at 2534. In the present case, there is no such conflict. Instead of competing "shalls," there is a "shall" and a "may."

2. The Ninth Circuit's decision maintains the proper separation between the agencies' permitting programs under sections 402 and 404. It does not require applicants to obtain permits under both sections for the same discharge. The court stated explicitly that the "program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation . . . ." State App. 17a; *see also id.* at 26a ("If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa.") (quoting EPA/Corps responses to comments).

The court's observation that section 301(a) requires compliance with both section 402 "and" sec-

tion 404 does not mean that a single discharge requires permits under both. *See id.* at 14a-15a; 33 U.S.C. § 1311(a). As Petitioners correctly recognize, not every one of the enumerated provisions in Section 301(a) applies to every discharge. For example, section 306, by its terms, applies only to "new" sources. 33 U.S.C. § 1316. Similarly, the statutory scheme ensures that only one permitting program is applicable to any given discharge. For the reasons discussed above, discharges subject to EPA effluent limitations may be permitted by EPA under section 402 but not by the Corps under section 404. Conversely, discharges properly permitted under section 404 do not require section 402 permits. *See id.* § 1342(a)(1) ("Except as provided in section[] . . . [404] . . .").

To recognize that compliance is required only with the applicable provisions does not lead to the conclusion that "and" within section 301(a) means "or." This substitution would allow dischargers to pick and choose which of seven enumerated sections of the Act to observe, when Congress clearly intended compliance with each applicable provision. *See id.* § 1311(a). The Ninth Circuit's interpretation is correct.

3. The Clean Water Act contains neither an express nor an implied exception for "fill material" from the blanket prohibition of section 306(e).

Petitioners wrongly attempt to characterize section 404(p) as an express exception. *See* Coeur Pet. at 24. That section does not provide any exceptions to the law, nor does it determine when or under what conditions the Corps has authority to issue a permit. By its plain language, it is merely a limited enforce-

ment shield for dischargers who have received and comply with permits. 33 U.S.C. § 1344(p). It applies exclusively "for purposes of sections 1319 and 1365 of this title," *id.*, which are the enforcement provisions of the Act. *Id.* §§ 1319 & 1365. That the law protects parties who comply with their permits from prosecution for violations of section 301 does not suggest that the Corps is free to ignore section 301 (or section 306) in deciding whether to issue a permit. Under Petitioners' interpretation, the "for purposes of" clause in section 404(p) would be superfluous.

That section 404(p) does not create an exception to sections 301 or 306 is apparent from the parallel provision in section 402(k), which is an enforcement shield for section 402 permits using language almost identical to that of section 404(p). *Compare* 33 U.S.C. § 1342(k) *with id.* § 1344(p). Compliance with a section 402 permit protects a discharger from enforcement actions for violations of sections 301 and 306, among others. *Id.* § 1342(k). Yet, section 402(a) requires that all section 402 permits contain conditions requiring compliance with the same sections. *Id.* § 1342(a)(1)(A). It would make no sense to require that discharges comply with sections 301 and 306 in one subsection only to exempt them in another. The enforcement shield provisions were not intended as exemptions from the law, but as limited protection from enforcement of laws that are otherwise applicable. *See E.I. du Pont de Nemours & Co.*, 430 U.S. at 138 n.28.

Where Congress intended exceptions from the Clean Water Act, it stated them directly, refuting any such interpretation of section 404(p). The Act provides an explicit exception to sections 301, 402,

and 404 for six enumerated categories of "fill material." *Id.* § 1344(f). It specifies several other explicit exceptions to the requirement to comply with effluent limitations. *Id.* §§ 1311(c), (h), (i), (m) & (p), & 1312(b)(2). It contains explicit exceptions for two specified types of discharges from the requirement to obtain a section 402 permit. *Id.* § 1342(*l*). None of these explicit exceptions is applicable to this case.

These explicit exceptions also refute any assertion of implied exceptions. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). This Court has applied a similar principle specifically to section 306: "In striking contrast to § 301(c), there is no statutory provision for variances [in § 306], and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.'" *E.I. du Pont de Nemours & Co.*, 430 U.S. at 138 (quoting S. Rep. No. 92-414, at 58 (1971)).

Nevertheless, Coeur suggests an implied exception for all fill material, drawn by negative inference from the fact that section 402 requires that permits be conditioned upon compliance with sections 301 and 306, while section 404 does not. *See* Coeur Pet. at 23-24; *compare* 33 U.S.C. § 1342(a)(1)(A) *with id.* § 1344(a). Implied exceptions are disfavored. *United States v. Rutherford*, 442 U.S. 544, 552 (1979). Coeur is correct that one must presume Congress acted purposely in choosing different language for sections 402 and 404. *S.D. Warren Co. v. Maine Bd.*

of Envtl. Prot., 547 U.S. 370, 383-84 (2006). However, as the Ninth Circuit pointed out, there is a simpler explanation for why Congress chose different language: Congress did not intend the Corps to issue "fill material" permits for discharges of industrial or municipal wastewater subject to EPA effluent limitations. State App. 17a. The prohibitions of sections 301(e)[5] and 306(e), combined with section 402's requirement that permits be conditioned upon compliance with these provisions, evince a clear Congressional intent that discharges subject to effluent limitations be permitted under section 402. *See* 33 U.S.C. §§ 1311(e), 1316(e), 1342(a)(1)(A). This interpretation explains the difference in language between sections 402 and 404, hews closer to the purposes of the Act, follows decades of agency practice, and harmonizes the provisions without resorting to implied exceptions by negative inference.

4. The application of effluent limitations to industrial wastewater discharges furthers the purposes of the Clean Water Act. Subjecting these discharges to a statutory scheme intended for "dredged or fill material," merely because they contain solids, would defeat those purposes.

The Act seeks to reduce and, where practicable, eliminate discharges of water pollution through the use of increasingly strict, nationally uniform effluent limitations. For existing industrial and municipal

---

[5] For effluent limitations that are not new source performance standards, section 301(e) has the same effect that section 306(e) has for performance standards. *See* 33 U.S.C. §§ 1311(e) & 1316(e); State App. 12a-13a & n.8.

sources of pollution, the Act requires EPA to adopt technology-based effluent limitations that become more stringent over time. *See* 33 U.S.C. § 1311(b); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 118 (1985). For new sources, like the froth-flotation mill at the Kensington Mine, the Act requires even stricter effluent limitations called standards of performance. 33 U.S.C. § 1316(a)(2). These standards must reflect "the best available demonstrated control technology, processes, operating methods, or other alternatives...." *Id.* § 1316(a)(1). Congress directed EPA to adopt, where practicable, "a standard permitting no discharge of pollutants." *Id.* Pursuant to this directive, EPA studied the mining industry and determined that a no-discharge standard was practicable for new froth-flotation mills. *See* 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982); 47 Fed. Reg. 25,682, 25,688 (June 14, 1982).

To escape EPA's carefully considered no-discharge requirement by labeling the discharge "fill material," and finding an implied exception to the blanket prohibition of section 306(e), would defeat the Congressional purposes of requiring increasingly stringent control methods over time, eliminating discharges where practicable, and ensuring national uniformity. *See E.I. du Pont de Nemours & Co.*, 430 U.S. at 137.

B. The Ninth Circuit's Decision Adheres to the Authoritative Agency Interpretation Set Forth in the Federal Register.

Although the Ninth Circuit found that the plain language of the Clean Water Act resolves the ques-

tion presented in this case, the court also confirmed its conclusion with a *Chevron* step two analysis of the agencies' interpretations of the statute and the regulations. State App. 18a-19a. The court correctly determined that the Kensington permit issued by the Alaska District office of the Corps was inconsistent with the stated intent of the heads of the Corps and EPA published in the Federal Register when they promulgated their joint definition of "fill material" in 2002. To the extent of any ambiguity in the Clean Water Act or in the regulations, the courts owe deference only to the agencies' authoritative explanation in the Federal Register, not to the subsequent inconsistent permitting decision of the Alaska District.

The adoption of the 2002 fill rule created an acknowledged potential for misinterpretation. There are now two regulations that could lead to opposite conclusions if not considered in their statutory and regulatory context. EPA's 1982 performance standard for new froth-flotation mills is unambiguous and plainly prohibits the discharge from the Kensington facility and others like it: "[T]here shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . ." 40 C.F.R. § 440.104(b)(1). However, the 2002 joint agency definition of "fill material" includes anything that "has the effect of . . . Changing the bottom elevation of any portion of a water of the United States." *See* 33 C.F.R. § 323.2(e)(1)(ii); *see also id.* § 323.2(f) (defining "discharge of fill material" to include "placement of overburden, slurry, or tailings"). The potential for misinterpretation occurred when public participants in the rulemaking process concluded—mistakenly—that the expansive new definition of fill material would overrule EPA's longstand-

ing effluent limitations, not only for froth-flotation wastewater discharges, but for many other industrial and municipal discharges that contain solids.

Properly understood, these two rules are not in conflict. The EPA standard squarely prohibits the discharge, while the fill material rule is merely a definition that does not, by itself, authorize anything. As discussed above, the discretionary authority of the Corps to issue section 404 permits is not unfettered. Even a proposed discharge that otherwise falls within the new definition of "fill material" may be prohibited or limited by other applicable laws, including effluent limitations.[6]

Nevertheless, EPA and the Corps acknowledged that the new rule created some confusion, and they explained exactly what they intended at the time. The Ninth Circuit interpreted their explanation correctly.

1. The Administrator of EPA and the responsible official in the Department of the Army overseeing the Corps addressed the precise circumstance of this case in the Federal Register when they adopted the 2002 joint rule. They explained—repeatedly, consistently, and clearly—that discharges subject to EPA effluent limitations would continue to be subject to

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[6] The State, but none of the other Petitioners or *Amici*, argues that 40 C.F.R. § 122.3(b) exempts anything meeting the definition of "fill material" from section 402. State Pet. at 27. On its face, that regulation merely begs the question of whether the discharges "are regulated under section 404 of the CWA." 40 C.F.R. § 122.3(b). To the extent there is any ambiguity, EPA and the Corps made their intentions clear in the 2002 fill rule.

EPA's jurisdiction under the section 402 permitting program, even if they otherwise met the new definition of fill material. The Ninth Circuit described this history in considerable detail. State App. 20a-30a.

Petitioners err by focusing on isolated, general sentences in the 2002 Federal Register preamble about the broad scope of the new definition, while ignoring the full context of those statements. Every one of these references is from the same page of the Federal Register. *See* Coeur Pet. at 27-28; State Pet. at 27. Rather than trying to deduce the intent of the rule from these few sentences, it is most helpful to review the agencies' complete explanation of this issue, as quoted in the Ninth Circuit opinion:

> [W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified wastestreams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the

> bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.* Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs.

State App. 25a-26a (quoting 67 Fed. Reg. 31,129, 31,135 (May 9, 2002)) (emphasis added by court). If this were not clear enough, the agencies made the same point again in the specific context of mine tailings:

> Some commenters also noted that the proposed rule language and preamble discussion created some confusion about whether mine overburden and mine tailings are both subject to section 404 regulation as opposed to section 402. Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. *Nevertheless*, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid. *Moreover*, NPDES permits is-

> sued pursuant to section 402 are intended to regulate process water and provide effluent limits that are protective of receiving water quality. This distinction provides the framework for today's rule.

ER 277 (emphasis added), *quoted in part in* State App. 28a.[7] The Kensington discharge comes under both the "nevertheless" and the "moreover" qualifications to the general rule that mine tailings are fill material. *See id.* It is subject to an EPA effluent limitation, and it is process water. The Ninth Circuit put it aptly: "The agencies could not have been more clear in articulating that this would be their preferred approach." State App. 29a.

This Court has consistently held that statements, like those quoted above, made by agency heads at the time of promulgating a rule are authoritative and control over subsequent, inconsistent interpretations by lower level agency officials. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (court will not defer to agency interpretation that contradicts agency's intent at the time it promulgated regulation); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-16 (1985) (holding that clear agency statement in Federal Register at time of promulgation was "dispositive" of the agency's intent); *United States v. Mead Corp.*, 533 U.S. 218, 226-34 (2001) (generally applicable agency rules adopted through formal administrative procedures

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[7] The document quoted is the agencies' joint Response to Comments on the rule, which was incorporated by reference in the Federal Register notice. 67 Fed. Reg. at 31,131.

are entitled to *Chevron* deference, but less formal agency actions by lower level officials are not). Under these principles, if a court finds the Clean Water Act or the agencies' regulations ambiguous, the courts should defer to the intent stated in the Federal Register at the time of adopting the fill rule. No such deference is owed to the Alaska District's decision to issue the Kensington permit. Because the permit decision was inconsistent with the statement of intent in the Federal Register, the permit must give way.

2. Contrary to the assertions of Petitioners and *Amici*, *e.g.*, Coeur Pet. at 30-31, the Ninth Circuit's decision does not invalidate or modify the 2002 joint definition of "fill material." The court was explicit about this. State App. 24a n.12. Again, the 2002 rule is merely a definition that does not exempt any discharges from any applicable legal requirements. *See* 33 C.F.R. § 323.2(e) & (f). The Ninth Circuit's review of the regulatory history merely confirms that the agencies' intent was consistent with the limitations on the Corps' authority stated explicitly in sections 301(a), 301(e), and 306(e) of the Act.

3. Petitioners' interpretation of the 2002 fill rule would not only contradict the plain language of the Clean Water Act and the agencies' stated intent, but it would cause an impermissible implied repeal of numerous EPA regulations.

If Petitioners were right, EPA's no-discharge rule for new froth-flotation mills would be a nullity. The nature of mining mills is that they process huge quantities of earth to extract small amounts of metal, thereby generating process wastewater laden with solids, *i.e.*, tailings. EPA explicitly noted this

fact in adopting the rule: "Mill process wastewater is characterized by very high suspended solids levels (often in the percent range rather than milligrams per liter) . . . ." 47 Fed. Reg. 25,682, 25,685 (June 14, 1982), *quoted in* State App. 20a. For this reason, discharges of mill process wastewater inherently have the effect of "[c]hanging the bottom elevation" of the receiving water body, meeting the new definition of "fill material." 33 C.F.R. § 323.2(e)(1)(ii). If the adoption of this definition authorized the Corps to grant permits for froth-flotation wastewater discharges, it had the *de facto* but unstated effect of repealing the no-discharge standard.

Any such modification of effluent limitations would render the 2002 fill rule arbitrary. An agency may repeal or modify its rules, but it "is obligated to supply a reasoned analysis for the change...." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). In this case, the agency provided no analysis—reasoned or otherwise—for any such change. To the contrary, EPA and the Corps stated just the opposite: that effluent limitations adopted by EPA would continue to apply notwithstanding the new definition.

In fact, under Petitioners' interpretation, it is not only the effluent limitations for froth-flotation mills that would be impliedly repealed, but those of many sources whose wastewater discharges contain suspended solids that eventually settle to the bottom. Besides froth-flotation mills, such sources include facilities for processing or manufacturing dairy products, grains, cement, leather, and timber products, among others. *See* 40 C.F.R. parts 405, 406, 411, 425, & 429. Under Petitioners' interpretation, EPA's

effluent limitations for these sources would no longer be effective, because the solids would render the discharges "fill material" subject to section 404 permits. This was, explicitly, not the intent of the agencies. *See* State App. 26a (quoting 67 Fed. Reg. 31,129, 31,135 (May 9, 2002)).

CONCLUSION

The petitions for a writ of certiorari should be denied.

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REPLY BRIEF

Nos. 07-984 and 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER COEUR ALASKA, INC.

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QUESTION PRESENTED

Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for discharges of "fill material" provided that the discharges comply with that section's water-quality requirements, which are jointly developed by the Corps of Engineers and the Environmental Protection Agency. 33 U.S.C. § 1344(a), (b)(1). By regulation, the Corps of Engineers and EPA have jointly defined "fill material" generally as any material that has the net effect of raising the bottom elevation of a water of the United States, including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)–(f); 40 C.F.R. § 232.2.

In this case, the Ninth Circuit held that the Corps of Engineers lacked authority under Section *404* to issue a permit for the discharge of fill material whenever the discharge implicates any effluent restriction promulgated by EPA as part of its permit program under Section *402* of the Act. On that basis, the Ninth Circuit invalidated a Section 404 discharge permit issued to Petitioner Coeur Alaska, Inc.

The question presented is whether the Ninth Circuit erred in rejecting the expert agencies' joint interpretation of the Act that effluent restrictions promulgated as part of EPA's Section 402 permit program do not apply to discharges of fill material permitted by the Corps of Engineers under Section 404.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to Southeast Alaska Conservation Council, the Sierra Club and Lynn Canal Conservation were appellants in the court of appeals. In addition to Coeur Alaska, Inc. and to the State of Alaska, which is the petitioner in No. 07-990, the following parties (or their predecessors in office, *see* this Court's Rule 35.3) were appellees in the court of appeals and are respondents in this Court pursuant to this Court's Rule 12.6: the United States Army Corps of Engineers; Kevin J. Wilson, in his official capacity as District Engineer; Michael Rabbe, in his official capacity as Chief of the Regulatory Branch; George S. Dunlop, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); the United States Forest Service; and Goldbelt, Inc.[1]

The corporate disclosure statement included in Coeur Alaska's petition for a writ of certiorari remains accurate.

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[1] Kevin J. Wilson replaced Timothy J. Gallagher as District Engineer, Michael Rabbe replaced Larry L. Reeder as Chief of the Regulatory Branch, and George S. Dunlop replaced Dominic Izzo as Principal Deputy Assistant Secretary of the Army (Civil Works).

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS AND REGULATIONS INVOLVED 1

STATEMENT 2

SUMMARY OF ARGUMENT 11

ARGUMENT 15

I. THE NINTH CIRCUIT'S HOLDING THAT COEUR'S SECTION 404 DISCHARGE PERMIT VIOLATES THE CLEAN WATER ACT IS PLAINLY ERRONEOUS 15

A. The Corps Appropriately Issued A Section 404 Permit To Coeur For Its Discharge Of Fill Material 16

B. The Ninth Circuit Incorrectly Held That The Corps' Permit Violated Sections 301 and 306 of the Clean Water Act 22

II. THE NINTH CIRCUIT ERRED BY REJECTING THE CORPS' CONSTRUCTION OF ITS OWN RULE 32

A. The Ninth Circuit Disregarded The Text Of The Fill Rule 33

B. The Regulatory History Confirms That Effluent Restrictions Do Not Apply To Discharges Of Fill Material, Including Mine Tailings 35

C. The Corps Has Long Regulated Discharges Of Mine Tailings As Fill Material 39

TABLE OF CONTENTS—CONTINUED

Page

CONCLUSION 44

APPENDIX: Relevant Provisions of the Clean Water Act and Regulations Involved 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins, 519 U.S. 452 (1997) 32

Bates v. United States, 522 U.S. 23 (1997).....27

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).....32, 33, 35

Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002).....43

E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977).....23, 26

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).....23

Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147 (2008).....34

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004).....24

HCSC-Laundry v. United States, 450 U.S. 1 (1981).....28

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993).....38

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 24

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991).....43

Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007).....43

TABLE OF AUTHORITIES—CONTINUED

Page(s)

Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) 13, 28

Officemax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005).....25

Perrine v. Chesapeake & Del. Canal Co., 50 U.S. 172 (1850).....25

Rapanos v. United States, 547 U.S. 715 (2006).....24

Russello v. United States, 464 U.S. 16 (1983) 38

S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370 (2006).....13, 27

Slodov v. United States, 436 U.S. 238 (1978).....25

Townsend v. Little, 109 U.S. 504 (1883).....28

Udall v. Tallman, 380 U.S. 1 (1965).....34

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988).....12

United States v. Fisk, 70 U.S. 445 (1866).....25

United States v. Locke, 471 U.S. 84 (1985).....14, 34

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).....38

Statutes

33 U.S.C. § 407a 40

33 U.S.C. § 1251 15

33 U.S.C. § 1311(a).....2, 15, 29

TABLE OF AUTHORITIES—CONTINUED

Page(s)

33 U.S.C. § 1311(e) 2

33 U.S.C. § 1316(e) 2, 13, 23

33 U.S.C. § 1342(a) ..... passim

33 U.S.C. § 1342(k) 29

33 U.S.C. § 1343(c) 44

33 U.S.C. § 1344(a) 2, 11, 16

33 U.S.C. § 1344(b) 2, 26, 29

33 U.S.C. § 1344(c) 3

33 U.S.C. § 1344(d) 2

33 U.S.C. § 1344(f) 3, 27, 29

33 U.S.C. § 1344(h)(1)(A) 29

33 U.S.C. § 1344(p) 3, 29

33 U.S.C. § 1344(r) 3

Regulations

33 C.F.R. § 320.4 18

33 C.F.R. § 323.2(e) 17, 32, 35, 38

33 C.F.R. § 323.2(f) ..... passim

33 C.F.R. § 323.6 18

40 C.F.R. § 122.3(b) 4, 25, 43

40 C.F.R. § 125.4(d) (1973) 4, 25

40 C.F.R. pt. 230 18

40 C.F.R. § 232.2 ..... 5, 17

40 C.F.R. § 401.11(i) 23

TABLE OF AUTHORITIES—CONTINUED

Page(s)

40 C.F.R. § 434.10 42

40 C.F.R. § 440.102(a) 40, 41

40 C.F.R. § 440.104(b)(1) 40

Other Authorities

Coal Mining Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 50 Fed. Reg. 41,296 (1985) 42

Environmental Permit Regulations, 48 Fed. Reg. 14,153 (1983) 4

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816 31

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (2002) ..... passim

H. Rep. No. 95-139 (1977) 37, 40

Hearings on H.R. 11896 Before the H. Comm. on Public Works, 92 Cong. 308 (1971) 30, 31

Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794 (1982) 41, 42

Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (1982) 40

TABLE OF AUTHORITIES—CONTINUED

Page(s)

Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292 (2000).....3, 4, 5, 37

Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092 (2007).....41

S. 2770, 92d Cong. § 402 (1971).....30

S. Rep. No. 92-1236 (1972) (Conf. Rep.).....30

Senate Consideration of the Report of the Conference Committee on Amendment of the Federal Water Pollution Control Act (Oct. 4, 1972).....31

Senate Debate on S. 2770 (Nov. 2, 1971).....30

S. Ct. R. 24.1(f).....1

BRIEF FOR PETITIONER COEUR ALASKA, INC.

OPINIONS BELOW

The court of appeals' opinion is reported at 486 F.3d 638. J.A. 517a. The order denying the petition for rehearing en banc is unreported. *Id.* 552a. The court of appeals' order granting respondents' emergency motion for an injunction pending the appeal is unreported, *id.* 509a, as is its order denying Coeur Alaska's motion to vacate that injunction, *id.* 511a. The opinion of the United States District Court for the District of Alaska is also unreported. *Id.* 478a.

JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on May 22, 2007, and it denied, on October 29, 2007, the timely filed petition for rehearing en banc of Coeur Alaska, Inc. ("Coeur"). Coeur's petition for a writ of certiorari was filed on January 28, 2008, and granted on June 27, 2008, along with the related petition of the State of Alaska. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The text of the pertinent provisions of the Clean Water Act, 33 U.S.C. §§ 1257–1387, and the regulations interpreting and administering the Act are set out in an appendix to this brief, *infra*, at 1a. *See* S. Ct. R. 24.1(f). The pertinent provisions are: 33 U.S.C. §§ 1311, 1316, 1342, and 1344; 33 C.F.R.

§ 323.2; and 40 C.F.R. §§ 122.3, 232.2, 401.11, 434.10, 440.102, and 440.104.

STATEMENT

1. Section 301 of the Clean Water Act broadly prohibits the discharge of pollutants into navigable waters of the United States "[e]xcept as in compliance with" certain of its provisions, including Sections 301, 306, 402, and 404. 33 U.S.C. § 1311(a). Section 402 authorizes EPA to "issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). Discharges that fall under Section 402—also known as the National Pollution Discharge Elimination System ("NPDES") program—must meet "all applicable requirements" under Sections 301, 306, and several other provisions of the Clean Water Act. *Id.* Section 301(e) requires compliance with "[e]ffluent limitations" applicable to existing point sources, *id.* § 1311(e), while Section 306(e) applies more stringent effluent restrictions, known as "standards of performance," to new point sources, *id.* § 1316(e). These effluent restrictions are promulgated in the form of regulations issued by EPA. The Section 402 NPDES permit scheme applies to all discharges into the navigable waters "[e]xcept as provided in section[] . . . [404]." 33 U.S.C. § 1342(a)(1).

Section 404 of the Clean Water Act entrusts to the Corps of Engineers the authority to "issue permits . . . for the discharge of . . . fill material into the navigable waters." 33 U.S.C. § 1344(a); *see also id.* § 1344(d). Discharges of fill material governed by Section 404 must satisfy water-quality requirements (known as Section 404(b)(1) guidelines) developed by EPA, in consultation with the Corps, under criteria established by Congress. *Id.* § 1344(b) (cross-referencing criteria in 33 U.S.C. § 1343(c)). More-

over, Section 404(c) provides an additional protection for water quality by stating that EPA may veto any permit the Corps proposes to grant. *Id.* § 1344(c). Section 404 does not, however, require compliance with effluent limitations or standards of performance promulgated by EPA under its Section 402 NPDES permit program. Indeed, the only references in Section 404 to either Section 301 or Section 306 are two provisions—Section 404(f) and Section 404(r)—that state that certain discharges of fill material are "not prohibited by or otherwise subject to regulation" under Section 301, and another—Section 404(p)—that states that compliance with a Section 404 discharge permit "shall be deemed compliance" with Section 301. 33 U.S.C. § 1344(f), (p), (r). Section 306 is not mentioned at all.

The division of labor Congress prescribed in Sections 402 and 404 makes sense. As EPA and the Corps have explained, "[i]n keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, sections 404 and 402 employ different approaches to regulating the discharges to which they apply." Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,293 (Apr. 20, 2000). The Section 402 program focuses on "water quality standards for the receiving water" and controls pollutant discharges "principally through the imposition of effluent limitations, which are restrictions on the 'quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters.'" *Id.* "Fill material," on the other hand, "differs fundamentally from the types of pollutants covered by section 402 because the princi-

pal environmental concern is the loss of a portion of the water body itself." *Id.* "The term 'fill material' clearly contemplates material that fills in a water body." *Id.*

Consistent with Congress's intention to make these permitting regimes mutually exclusive, *see* 33 U.S.C. § 1342(a) ("Except as provided in section[] . . . [404]"), EPA has long provided that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require [EPA] NPDES permits" under Section 402 of the Act. 40 C.F.R. § 122.3(b) (promulgated at Environmental Permit Regulations, 48 Fed. Reg. 14,153, 14,157–58 (Apr. 1, 1983)); *see also* 40 C.F.R. § 125.4(d) (1973) (earlier regulation providing that "fill material discharged into navigable waters" does "not require an NPDES permit"). Both EPA and the Corps, moreover, have affirmed that "EPA has never sought to regulate fill material under effluent guidelines." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002).

Because the term "fill material" is not defined by the Clean Water Act, these agencies, acting within the discretion delegated to them by Congress, issued a joint regulation (the "Fill Rule") to "determine[] the basic jurisdiction of the section 404 versus the section 402 program." Final Revisions, 67 Fed. Reg. at 31,133. EPA and the Corps chose to define the Fill Rule's "key jurisdictional terms" by using an "objective, effects-based test that ensures consistent treatment of like discharges" and that "prevents uncertainty for the regulated community as to what regulatory program applies to particular discharges." *Id.*; *see also* Proposed Revisions, 65 Fed. Reg. at

21,293 ("Providing a clear and consistent definition for the term 'fill material' . . . is important in determining whether a proposed discharge of a pollutant is subject to regulation under section 404 or section 402.").

In the Fill Rule, the agencies defined "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii); 40 C.F.R. § 232.2. The agencies further provided that the term "discharge of fill material" "generally includes . . . placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.

The discharge at issue in this case is the placement of mine tailings, transported as a slurry, into Lower Slate Lake in southeastern Alaska, where, all agree, the tailings would "raise the bottom elevation of the lake by 50 feet." J.A. 519a.

2. The Kensington Gold Mine is located about 45 miles north of Juneau, Alaska, at the site of a mine previously operated from 1897 to 1928. Coeur's plan of operations for reinvigorating the mine provides for conventional milling of ore on site through a "froth-flotation" process that separates valuable ore from the remaining minerals. Under this process, crushed ore is fed into flotation tanks where air, conditioners, and frothing agents cause gold-bearing minerals to attach to air bubbles and float to the top of the tank. The gold-bearing froth is then skimmed off and further concentrated in additional flotation tanks. Most of the chemicals added in the froth-flotation process and most other metals naturally occurring in the gold-bearing ore will be removed with the froth con-

centrate or will remain in the flotation tanks. J.A. 481a–82a, 191a.

The remaining tailings—finely ground, solid material resembling wet sand, C.A. E.R. 77[1]—will then be removed from the flotation tanks and, after the addition of settling agents that "are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the settling of the fine material," J.A. 482a n.15, transported in a slurry form via a 3.5-mile pipe into a secure impoundment in Lower Slate Lake. Over the 10- to 15-year life of the project, the mill processing operations will yield a great deal of valuable ore, but also several million tons of mine tailings. Approximately 40 percent of the tailings can be backfilled into the mine. *Id.* 520a. Coeur proposed disposing of the remainder—up to 4.5 million tons—by placing them into a carefully designed impoundment in Lower Slate Lake. Coeur also developed a reclamation plan designed to restore the lake's fish population at the close of operations. J.A. 249a. Because the largely solid mine tailings constitute "fill material" (the tailings indisputably would "[c]hang[e] the bottom elevation" of the lake, 33 C.F.R. § 323.2(e)(1)(ii)), Coeur sought a permit from the Corps under Section 404.

The Corps thoroughly considered both Coeur's proposed discharge and several alternative methods of tailings storage. After taking into account the input of several other agencies (including Environmental Impact Statements prepared by the Forest Service in cooperation with the Corps, EPA, and the

[1] "C.A. E.R." refers to the Excerpts of Record filed in the court of appeals. "C.A. J S E.R." refers to the Joint Supplemental Excerpts of Record also filed in the court of appeals.

Alaska Department of Natural Resources, and a Record of Decision by the Forest Service), the Corps ultimately approved the use of a tailings impoundment in the Lower Slate Lake. The Corps' Record of Decision concluded that the tailings impoundment was "the least environmentally damaging practicable alternative." J.A. 366a. The Corps also determined that the principal alternative proposal, storing the mine tailings in a dry tailings facility, would be "more damaging" than depositing them in Lower Slate Lake because upland disposal would cause a "permanent loss of wetland[s]" that would "outweigh[] the temporary losses to the lake." *Id.* Evaluating Coeur's proposed discharge, the Corps concluded that it satisfied the Section 404(b)(1) water-quality requirements promulgated by EPA in consultation with the Corps. By granting the Section 404 permit, which incorporated numerous protective requirements under Section 404(b)(1) guidelines, the Corps authorized Coeur to discharge tailings into Lower Slate Lake. *Id.* 266a–86a.

The Alaska Department of Environmental Conservation certified that the proposal would comply with Section 401 of the Act and with Alaska's water-quality standards. J.A. 368a. Recognizing the clear fill effect of the tailings discharge into the Lower Slate Lake impoundment, EPA concurred with the Corps that Section 404 was the applicable permitting regime, that, accordingly, Section 301 and Section 306 effluent restrictions did not apply, and that Coeur's proposed discharge satisfied EPA's Section 404(b)(1) water-quality requirements. After reviewing multiple analyses and working with the Corps to resolve environmental concerns, EPA concurred in the Corps' issuance of the permit, declining to exercise its ultimate veto authority under Section 404(c).

EPA also issued a Section 402 permit, incorporating standards of performance promulgated under Section 306, to govern the subsequent discharge of effluent from the lake impoundment into the small adjacent creek leading to more substantial downstream waters. J.A. 287a, 292a, 317a.

3. Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") sued the Corps of Engineers and the Forest Service, arguing that the issuance of Coeur's Section 404 permit for the discharge of fill material violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), and Sections 301(a), 301(e), and 306(e) of the Clean Water Act. SEACC relied on an EPA regulation that states that "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores," 40 C.F.R. § 440.104(b)(1), and argued that this "no discharge" performance standard (promulgated under Section 306) precluded any disposal of mine tailings under a Section 404 permit.

SEACC alternatively challenged the agencies' construction of their own joint regulatory definition of "fill material," arguing that it was arbitrary and capricious to construe the term "discharge of fill material"—a term which the Fill Rule explicitly provides "includes . . . placement of . . . slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2—to include the proposed Kensington mine tailings slurry. J.A. 475a ¶ 72. SEACC did not challenge the validity of the Fill Rule itself or its definition of Section 404's ambiguous statutory term "fill material." Rather, it rested its argument on the contention that the Fill Rule could

not reasonably be interpreted to apply to Coeur's particular discharge of mine tailings.

After Coeur, the State of Alaska, and Goldbelt intervened in defense of the Corps' issuance of the Section 404 permit, the district court granted the defendants' motion for summary judgment and upheld the permit, holding that "[t]he Corps properly issued the permit to Coeur Alaska, Inc. under § 404." J.A. 495a. The district court recognized that the Clean Water Act "divides the permitting process into two segments" and that different standards apply under Sections 402 and 404, *id.* 490a–91a; accordingly, the district court concluded that "[i]f the permit was properly issued under § 404, [the effluent limitations of Sections 301(e) and the standards of performance of 306(e)] are inapplicable," *id.* 488a n.35. The district court also rejected SEACC's argument that statements in the regulatory history rendered unreasonable the agencies' interpretation of their own Fill Rule to permit a discharge that "facially falls within the definition of 'fill material' contained in the regulations." *Id.* 492a.

4. The Ninth Circuit issued an emergency injunction pending appeal, J.A. 509a–10a, and thereafter reversed the judgment of the district court and invalidated Coeur's Section 404 permit. The court of appeals concluded that the Corps, by issuing a permit to Coeur for a discharge that "facially meets the Corps' current regulatory definition of 'fill material,'" *id.* 526a, and that "facially qualif[ies] for permitting under § 404," *id.* 531a, had nevertheless "violated the Clean Water Act," *id.* 550a.

The court of appeals purported to base its conclusion on "the plain language of the Clean Water Act." J.A. 526a. The court contended that Section 301(a)

"prohibits all discharges of any pollutant . . . except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404." *Id.* 527a–28a. Relying on Section's 301's "use of 'and' as a connector," the court concluded that "§ 301(a) prohibits *any* discharge that does not comply with . . . both § 301 and § 306, as well as § 402 and § 404." *Id.* 531a. Thus, the court concluded that "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." *Id.* 533a. "[T]he NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for [such] discharges." *Id.* 533a–34a.

The court also argued that the use of "all" and "any" in Sections 301(e) and 306(e) meant that effluent restrictions promulgated by EPA applied to all discharges, even those permitted by the Corps under Section 404. J.A. 531a. The Ninth Circuit reached that conclusion despite the fact that discharges permitted by Section 404 must comply with a different set of EPA water-quality standards—the Section 404(b)(1) guidelines.

The court also proffered an alternative holding that, even though Coeur's proposed discharge "facially meet[s] the definition of the term 'fill material,'" J.A. 538a, the "regulatory history" nonetheless demonstrated that the Corps had unreasonably interpreted its own regulation as encompassing Coeur's discharge. *Id.* 535a. The regulation's plain language notwithstanding, the panel concluded that the regulation must be interpreted to include "only . . . those tailings and other mining-related materials

that are not subject to effluent limitations or standards of performance." *Id.* 546a.

5. The court of appeals denied rehearing, J.A. 553a, but, on Coeur's motion, stayed its mandate pending review by this Court. *Id.* 554a. After granting the stay, however, the court of appeals issued another order, this time on SEACC's motion, to require Coeur, the Corps, and the Forest Service to prepare and approve a reclamation plan by April 1, 2008. *Id.* 555a.

SUMMARY OF ARGUMENT

Even though Section 404 of the Act broadly authorizes the Corps of Engineers—and only the Corps of Engineers—to issue permits "for the discharge of . . . fill material," 33 U.S.C. § 1344(a), and even though the joint EPA-Corps Fill Rule—unchallenged here—defines "fill material" generally as any material that has the net effect of raising the bottom elevation of a navigable water (including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f)), the Ninth Circuit held that the Corps lacks authority to issue a permit for the discharge of fill material whenever the proposed discharge implicates any of the hundreds of effluent restrictions promulgated by EPA. The Ninth Circuit offered two alternative rationales for its conclusion, and both are clearly erroneous.

1. The Ninth Circuit first held that, in issuing a Section 404 permit to Coeur for the discharge of fill material, the Corps contravened the text of the Clean Water Act. On the Ninth Circuit's view, the Act requires that, if an EPA effluent restriction could conceivably be applied to a discharge (even a discharge of fill material), it may be permitted only under EPA's Section 402 NPDES program. Section 404,

however, gives the Corps a clear mandate and unambiguous instructions with respect to the issuance of permits for the discharge of fill material, and there is no dispute here that the Corps followed the commands of Section 404 to the letter. After the Corps, EPA, the Forest Service, and several other federal and state agencies reviewed the effects of Coeur's proposed discharge, the Corps applied EPA's Section 404(b)(1) water-quality requirements and found them satisfied. EPA concurred, finding no basis to invoke its authority under Section 404(c) to veto the Corps' decision to issue an permit.

But Section 404 played no role whatsoever in the Ninth Circuit's analysis of the Corps' permitting authority. It instead concluded that, whatever the Corps' authority under Section 404, Section 301(a) and Section 306(e) of the Act precluded the Corps from issuing a permit for Coeur's proposed discharge. But statutory interpretation is a "holistic endeavor," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and the Ninth Circuit's construction of those two subsections cannot be reconciled with the whole of the Clean Water Act.

The Ninth Circuit read Section 301(a) as requiring—because it uses the word "and"—that every discharge into jurisdictional waters comply with both Section 301 *and* Section 306, as well as both Section 402 *and* Section 404. That reading of the conjunction, however, disregards the fact that it conjoins two pairs of mutually exclusive provisions: Section 301 applies to existing sources, while Section 306 applies only to new sources, and Section 404 applies only to fill material, while Section 402 applies to "any pollutant" "[e]xcept as provided in section[] . . . [404]." 33 U.S.C. § 1342(a). In that statutory context, "and"

can be sensibly construed only as a disjunctive. The Ninth Circuit seemed to admit as much when it treated the Section 402 NPDES program and the Corps' Section 404 program as mutually exclusive permitting alternatives.

The Ninth Circuit also contended that, because EPA has promulgated a standard of performance applicable to froth-flotation mining operations, Section 306(e), which makes it "unlawful for any . . . operator of any new source to operate such source in violation of any standard of performance applicable to such source," 33 U.S.C. § 1316(e), precluded the Corps from permitting Coeur's discharge of fill material. Buried in the Ninth Circuit's reasoning is an assumption that effluent restrictions promulgated by EPA under Section 301 and Section 306 apply to discharges of fill material, but reading the statute as a whole demonstrates that they do not. Section 404 specifically enumerates the water-quality requirements that apply to discharges of fill material and, in vivid contrast to Section 402, does not require compliance with EPA effluent restrictions. Congress's affirmative decision to impose different standards under Sections 404 and 402 must be given effect. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006). Moreover, if, as the Ninth Circuit stated, Sections 301(e) and 306(e) are "blanket prohibitions" that apply broadly and generally to "*all*" and "*any*" discharges, and Section 404 is a "limited" program that applies "only to dredged or fill material," J.A. 530a–32a, then, to the extent that the general rules of Sections 301(e) and 306(e) conflict with the specific rules of Section 404, Section 404's specific rules would control. *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002).

II. Backstopping its tendentious reading of isolated provisions of the Act, the Ninth Circuit held, in the alternative, that the Corps unreasonably interpreted its own regulation when it concluded that Coeur's proposed discharge of mine tailings fell within the regulatory definition of "fill material" set out in the joint EPA-Corps Fill Rule. Although the Ninth Circuit conceded that Coeur's proposed placement of tailings "facially meets" the Fill Rule's definition of "fill material," J.A. 526a, after reviewing the "regulatory history" the Ninth Circuit concluded, the text of the Fill Rule notwithstanding, that EPA and the Corps did not intend to include within their definition of "fill material" discharges that otherwise could be covered by an EPA effluent restriction. This Court has held, however, that an agency's construction that is consistent with plain *statutory* language "simply cannot be found 'sufficiently unreasonable' as to be unacceptable," *United States v. Locke*, 471 U.S. 84, 96 (1985), and this rule applies with even greater force when, as here, the agency is interpreting not a statute, but a *regulation* it wrote. And while the text of the Fill Rule is dispositive of any question concerning the reasonableness of the Corps' application of the regulation to Coeur's proposed discharge, the regulatory history further demonstrates that the Fill Rule applies to "*any* mining-related material that has the effect of fill when discharged," Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added), not, as the Ninth Circuit held, to "*only* . . . mining-related materials . . . not subject to effluent limitations," J.A. 546a (emphasis added). Indeed, the relevant "history" is that "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

In a case in which the validity of the Fill Rule was unchallenged, the Ninth Circuit effectively rewrote the regulation. It scrapped the jurisdictional line drawn by Congress in Section 404(a)—and clearly defined with objective criteria by the agencies in the Fill Rule—and replaced it with its own policy: an outright grant of primary jurisdiction to EPA, under which EPA regulates whatever discharges it chooses and the Corps regulates "fill material" only to the extent that EPA chooses not to do so. That is not what either Congress or the agencies intended. The decision of the court of appeals should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING THAT COEUR'S SECTION 404 DISCHARGE PERMIT VIOLATES THE CLEAN WATER ACT IS PLAINLY ERRONEOUS

The Clean Water Act protects the "chemical, physical and biological integrity of the Nation's waters" by permitting discharges into jurisdictional waters only if they comply with certain provisions of the Act. 33 U.S.C. §§ 1251 & 1311(a). The expert agencies tasked by Congress with applying the Act's two principal permitting regimes agree that the discharge at issue in this case falls squarely within the Section 404 program as a discharge of fill material. That conclusion could be rejected only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and to reach that result the Ninth Circuit announced an entirely novel construction of the Act: Effluent restrictions applicable under Section 402's general NPDES permit program henceforth would also apply to Section 404 permits, which govern specifically—

and only—discharges of fill material. The court's decision ignores the regulatory scheme of the Act, divorces particular terms from their context, and reads general provisions as trumping specific provisions. The court's decision cannot be reconciled with the Act or this Court's precedents.

A. The Corps Appropriately Issued A Section 404 Permit To Coeur For Its Discharge Of Fill Material

Section 404 of the Clean Water Act authorizes the Corps of Engineers to "issue permits . . . for the discharge of . . . fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). As the Ninth Circuit acknowledged, "[t]he Clean Water Act does not define the term 'fill material,'" J.A. 538a, and therefore the Corps and EPA, the two agencies responsible for the administration of the Clean Water Act, jointly defined the term after notice and comment. Neither SEACC nor the Ninth Circuit disputes the agencies' authority to interpret the undefined and ambiguous statutory term "fill material," nor do they dispute that the joint EPA-Corps definition of "fill material" is reasonable. J.A. 541a n.12 (explaining that because SEACC attacked only the Corps' application of its Fill Rule, and not the Fill Rule itself, "we do not reach the issue of the validity of these regulations"). As the agencies explained when promulgating the Fill Rule, the definitions provide an "objective effects-based test" that "determines the basic jurisdiction of the section 404 versus the section 402 program," "ensures consistent treatment of like discharges," and "prevents uncertainty for the regulated community as to what regulatory program applies to particular discharges." Final Revisions, 67 Fed. Reg. at 31,133. Under this jurisdic-

tional division, "EPA has never sought to regulate fill material under effluent guidelines." *Id.* at 31,135.

In their joint regulation, the agencies defined "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii) (Corps); 40 C.F.R. § 232.2 (EPA). They further defined "discharge of fill material" to include "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f) (Corps); 40 C.F.R. § 232.2 (EPA).

The proposed discharge in this case falls squarely within these definitions: The district court noted that "it is uncontested that the slurry to be discharged into Lower Slate Lake will 'change the bottom elevation' of the lake," J.A. 492a, and the Ninth Circuit agreed that "[t]he discharge . . . facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake," *id.* 526a. Indeed, the Ninth Circuit acknowledged that Coeur's proposed discharge of mine tailings will raise the bottom elevation of Lower Slate Lake by *50 feet*. *Id.* 519a.

Relying on Section 404 and on the Fill Rule's reasonable regulatory interpretation of that statute, both of which grant primary jurisdiction over discharges of fill material to the Corps, Coeur applied in 2001 to the Corps for a permit under Section 404 for its proposed tailings discharge into Lower Slate Lake, as part of an amended plan of operations for the Kensington Mine Project. J.A. 210a. Although the mine project had already undergone, in the words of the Corps in 1998, "intense public and

agency scrutiny for eight years," C.A. E.R. 255, Coeur's amended plan of operations and Section 404 permit application underwent another five years of agency review.

According to Corps regulations, applications for any type of permit from the Corps (including a Section 404 permit) must undergo (1) a public interest review; (2) an analysis of the proposal's effect on wetlands, which may include review by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service; (3) a fish and wildlife analysis; (4) a water-quality review; (5) an evaluation of historic, cultural, scenic, and recreational values; (6) a review of other federal, state, or local requirements; (7) an evaluation of the safety of impoundment structures; (8) consideration of any environmental benefits from the proposal; (9) a review of the proposal's economic impact; and (10) an analysis of any mitigating steps taken by the permittee. 33 C.F.R. § 320.4; *see also id.* § 323.6. In addition, applicants for a Section 404 permit must comply with the water-quality requirements of Section 404(b)(1), which address potential impacts on the physical and chemical characteristics of the aquatic ecosystem, on special aquatic sites (including wetlands), and on human use and which consider how to minimize any adverse effects from the proposal. 40 C.F.R. pt. 230. Coeur's amended plan of operations satisfied all of these requirements.

The review of Coeur's amended plan of operations began when the Forest Service, in cooperation with the Corps, EPA, and the State of Alaska, held public meetings and then prepared a Supplemental Environmental Impact Statement (to update prior statements prepared in 1992 and 1997). J.A. 210a–11a, 228a–29a. The agencies made a draft of the

Environmental Impact Statement available for public comment, and held additional public meetings to discuss it. *Id.* 230a. The Forest Service also prepared a Record of Decision for the mining project, addressing the Lower Slate Lake tailings facility and other project components and environmental issues. J.A. 207a–48a. The Corps conducted its own review of the project, aided by these Environmental Impact Statements, by the more than 900 individual reports that, at a cost of $26 million, have examined the potential environmental impact of the Kensington mine project, C.A. J.S.E.R. 800, and by public comments, including comments from public hearings in Alaska about the proposed permit. J.A. 369a. In addition to comments from the general public, the Corps considered comments from EPA, the National Marine Fisheries Service, other agencies, and from SEACC, *id.* 369–70a; *see also* C.A. J.S.E.R. 883, 888, 899. In response to these comments, Coeur agreed to take additional steps to protect water quality: For example, Coeur agreed to construct a reverse osmosis treatment facility for discharges from the lake impoundment into an outflowing creek and to use methods, such as silt screens, to confine suspended particles and turbidity to a small area in the lake. C.A. J.S.E.R. at 878, 880; *see also* J.A. 276a, 280a.

Evaluating the proposed discharge under the Section 404(b)(1) guidelines, the Corps determined that the proposed discharge would not violate State water-quality standards or toxic effluent standards (under Section 307 of the Act) and would not jeopardize endangered or threatened species or their critical habitat; the Corps also concluded that the discharge would not cause adverse impacts to human health or welfare, to the diversity, productivity, and stability of aquatic life and other wildlife or wildlife habitat, or

to recreational, aesthetic, and economic values. J.A. 384a–86a.

In accordance with Section 7 of the Endangered Species Act, the National Marine Fisheries Service reviewed the project, referring to the Forest Service's Supplemental Environmental Impact Statement, a biological assessment, and other studies. C.A. E.R. 478. After consulting with the Corps and the Forest Service, the Fisheries Service issued a Biological Opinion concluding that the project was not likely to jeopardize the continued existence of covered species or to adversely modify designated critical habitat. *Id.* The Alaska Department of Natural Resources similarly concurred that the project was consistent with the Alaska Coastal Management Plan. J.A. 369a. The Alaska Department of Environmental Conservation issued a certificate that the project would comply with Alaska's water-quality standards and program under Section 401 of the Act. *Id.* 368a.

Finally, in 2005, after Coeur submitted its final plan of operations and also a reclamation and closure plan, the Corps approved the Section 404 permit. J.A. 266a, 249a. EPA also issued a Record of Decision and a Section 402 permit to govern discharges *from* the tailings impoundment into downstream waters. J.A. 287a, 317a. In response to the initial filing of this lawsuit, the Corps further evaluated the project and, in 2006, issued a revised Record of Decision and reissued the Section 404 permit, again concluding that Section 404 was the appropriate permitting scheme and that its requirements had been satisfied. J.A. 342a.

In short, numerous state and federal agencies reviewed Coeur's proposal and its expected effects, *see, e.g.*, J.A. 227a–28a, and Coeur met every re-

quirement imposed by Section 404 and every additional requirement of the Corps, EPA, and other agencies participating in the permitting process. Following this comprehensive review, the Corps granted the Section 404 permit. J.A. 266a. As the issuance of the permit demonstrates, both the Corps and EPA agreed that the discharge of mine tailings into Lower Slate Lake was a permissible discharge of fill material under Section 404 of the Clean Water Act. In this case, SEACC challenged *none* of these agency findings except to contend that effluent restrictions promulgated by EPA under Sections 301 and 306 as part of its Section *402* permit program apply to discharges of fill material governed by Section 404 and, here, prohibit Coeur's proposed disposal of tailings.[2]

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[2] The Ninth Circuit alleged that the agencies "consistently informed Coeur Alaska that discharges from its froth-flotation mill would not be regulated as fill material under § 404." J.A. 546a. This erroneous version of the mine's history is based on three out-of-context quotations. First, the court cited a 1998 record of decision as stating that the Corps "'does not regulate the placement of tailings.'" *id.* 547a; *see also* C.A. E.R. 257, but it ignored the context: The proposal called for putting the tailings in a dry tailings facility (i.e., on dry land), not in a water of the United States. *See* C.A. E.R. 257. Second, the Ninth Circuit's statement that EPA informed Coeur Alaska in 2005—after the Section 404 permit was issued, J.A. 547a, 523a—that the froth-flotation performance standard applies to the mine is similarly off-point, *id.* 547a (citing a record of decision "for § 402 NPDES Permit"); *see also* J.A. 291a, for that statement applied to "the proposed discharge *from* the tailings storage facility (TSF) in Lower Slate Lake," J.A. 292a (emphasis added), which is subject to a separate Section 402 permit, not to the proposed tailings discharge *into* Lower Slate Lake, which is the subject of this case. Third, the court's reliance on a statement by a district engineer, J.A. 539a n.10, is misplaced because that memo-

[Footnote continued on next page]

B. The Ninth Circuit Incorrectly Held That The Corps' Permit Violated Sections 301 and 306 of the Clean Water Act

The Ninth Circuit held that the Corps' issuance of a discharge permit "violate[d] § 301 and § 306 of the Clean Water Act." J.A. 550a. The court of appeals reached this holding first by reading the word "and" in Section 301(a) to require compliance with mutually exclusive provisions and then by reading Sections 301(e) and 306(e) as applying even to discharges of fill material governed by Section 404. Thus, the Ninth Circuit concluded, the Corps lacks authority to grant a permit for a discharge that facially qualifies as "fill material" under Section 404 whenever "EPA has adopted an effluent limitation or performance standard applicable" to the discharge. *Id.* 533a. The Ninth Circuit's analysis, however, disregarded the structure of the Act and eschewed well-established rules of interpretation.

1. To demonstrate that EPA's effluent restrictions apply to discharges of fill material, the Ninth Circuit locked onto the word "and" in Section 301(a). The court of appeals argued that "[t]he use of 'and' as a connector, instead of 'or,'" in Section 301(a) "indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for

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[Footnote continued from previous page]

randum merely sought "to elevate to the Washington level" a jurisdictional dispute, C.A. E.R. 176, and the response from Washington directed that "the potential impacts of the discharge of mine tailings must be considered[] within the context of the section 404 permit evaluation," C.A. J.S.E.R. 1062.

permitting under § 404." J.A. 531a; *see also id.* 528a (quoting Section 301(a) with emphasis on the word "and"). Because of this "and," every discharge, in the Ninth Circuit's view, must "comply with several enumerated sections, including both § 301 and § 306, as well as § 402 and § 404." *Id.* 531a. But "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Here, the Ninth Circuit's reading of the word "and" cannot be reconciled with the whole of the Clean Water Act.

Context demonstrates that Section 301(a) cannot be read to require that all discharges comply with "both § 301 and § 306" and with their "effluent limitations and standards of performance." J.A. 531a. The text of Section 306(e) states that only "new" sources—not existing ones—need comply with standards of performance. 33 U.S.C. § 1316(e). As this Court explained shortly after the passage of the Clean Water Act, Section 306 provides for the establishment of "standards of performance for *new* sources," while "Section 301(b) defines the effluent limitations that shall be achieved by *existing* point sources." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 120–21 (1977) (emphases added). EPA also interprets these provisions as applying only in the alternative, clarifying in a regulation that effluent limitations under Section 301(e) apply only to "point sources[] *other than new sources*." 40 C.F.R. § 401.11(i) (emphasis added). In fact, even the Ninth Circuit contradicted itself by recognizing that pollutant discharges are "subject to an effluent limitation under § 301 *or* a standard of performance under § 306." J.A. 534a (emphasis added).

Nor does context permit the word "and" in Section 301(a) to require, as the interpretation of the Ninth Circuit suggests, that one must obtain permits under both Section 402 *and* Section 404 for the same discharge. The plain text of Section 402 makes clear that it applies only when Section 404 does not. 33 U.S.C. § 1342(a)(1) ("Except as provided in . . . [Section 404]"). This Court recently recognized that Section 402 and Section 404 are mutually exclusive permitting schemes. *See Rapanos v. United States*, 547 U.S. 715, 744 (2006) (plurality opinion) (contrasting "pollutants normally covered by the permitting requirement of [Section 402(a)]" with "'dredged or fill material'" and explaining that "[t]he Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)]"); *id.* at 760 (Kennedy, J., concurring) ("*Apart from* dredged or fill material, pollutant discharges require a permit from [EPA], which also oversees the Corps' . . . permitting decisions.") (emphasis added). Numerous courts of appeals have similarly acknowledged this mutual exclusivity. *See, e.g., Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 (7th Cir. 2004) ("[A] defendant who wishes to discharge a pollutant must first obtain a permit *either* under [Section 404] for the discharge of dredged or fill material *or* under [Section 402] for other pollutants.") (emphases added).[3]

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[3] *See also Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003) (recognizing that "cross-references, exclusions, and vetoes" interlocking Sections 404 and 402 "reinforc[ed] the fill-effluent distinction that has been followed by the agencies").

Both agencies charged with administering the two permitting schemes agree that Section 301 requires compliance with only "one of the two permitting programs." Final Revisions, 67 Fed. Reg. at 31,130. Indeed, since 1973, EPA has recognized that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require NPDES permits." 40 C.F.R. § 122.3(b); 40 C.F.R. § 125.4(d) (1973). *SEACC itself* acknowledged below the mutual exclusivity of these two sections. SEACC C.A. Br. 24 ("The Act provides that a single discharge will be governed by either section 402 or section 404, but not both."). And in the end, even the Ninth Circuit could not accept the logical conclusion of its own reading of "and": It did not require that Coeur comply with both "§ 402 and § 404," J.A. 531a, but instead held that "§ 402 is the only appropriate permitting mechanism" for discharges subject to an effluent limitation, *id.* 533–34a.

This Court has long recognized that "courts are often compelled to construe '*or*' as meaning '*and*,' and again '*and*' as meaning '*or*.'" *United States v. Fisk*, 70 U.S. 445, 447 (1866); *see also Slodov v. United States*, 436 U.S. 238, 246–48 (1978) (interpreting "and" as "or" to avoid a result "obviously at odds with the statute's purpose"). This is a corollary to the more general rule that courts may not "take out of a statute a single word susceptible of different meanings[] and expound it without reference to the context." *Perrine v. Chesapeake & Del. Canal Co.*, 50 U.S. 172, 190 (1850). When the word "and" "conjoins a list of mutually exclusive alternatives," "context *requires* the term to be construed disjunctively." *Officemax, Inc. v. United States*, 428 F.3d 583, 591 (6th Cir. 2005) (Sutton, J.) (emphasis added).

Section 301(a) need not be construed to require every discharge to comply with mutually exclusive provisions—with Sections 301 *and* 306, and with Sections 402 *and* 404. Indeed, the *only* sensible construction of Section 301(a) is as a list of each of the provisions of the Act that regulate discharges into jurisdictional waters and a prohibition on discharges "[e]xcept as in compliance with" those regulatory provisions applicable to the particular discharge. Accordingly, this Court in *Du Pont* did not consider all sections listed in Section 301(a) as applicable to the discharge of effluent then before the Court, but instead considered only Sections 301, 306, and 402 as "relevant to [the] case." 430 U.S. at 119 (making no mention of Section 404).

2. The Ninth Circuit's conclusion that the Corps' Section 404 permit violated Sections 301(e) and 306(e) of the Act is just as flawed, contravening both the structure and the history of the Act.

a. The structure of the Act demonstrates that Sections 301 and 306 do not apply to discharges permitted under Section 404. Section 404 requires compliance with Section 404(b)(1) water-quality requirements, guidelines developed by EPA in consultation with the Corps, based on criteria specifically designated by Congress. *See* 33 U.S.C. § 1344(b) (requiring EPA guidelines to be "based upon criteria comparable to the criteria applicable . . . under [Section 403(c) of the Act]"). Section 404 makes no mention of Section 301(e)'s effluent limitations or of Section 306(e)'s standards of performance. Instead, it is Section 402 that requires that discharges of pollutants meet "all applicable requirements under sections [301] . . . [and 306]." *Id.* § 1342(a)(1). Congress affirmatively expressed its intent to impose different

requirements under the different permitting programs—compliance with Section 404(b)(1) guidelines under Section 404, and compliance with effluent restrictions (including standards of performance) under Section 402.

As this Court recently reiterated in another Clean Water Act case, "if 'Congress includes particular language in one section of a statute'"—as Congress did in Section 402, stating that Sections 301 and 306 apply under that section—"'but omits [that language] in another section of the same Act'"—as Congress did in Section 404—"'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *S.D. Warren*, 547 U.S. at 384 (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)). If concluding that Sections 301(e) and 306(e) do not apply under Section 404 is, as the Ninth Circuit characterizes it, a "negative inference," J.A. 531a, it is a negative inference expressly approved by this Court when construing the Clean Water Act.[4]

Moreover, the specific provisions of Section 404 are properly construed as creating an exception to the general obligations imposed by Sections 301(e)

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[4] The Ninth Circuit also thought Section 404(f) weighed against finding an exception in Section 404 from the requirements of Sections 301 and 306 because Congress insisted "in § 404(f) that even the discharges from the enumerated activities [for which there is an explicit exception] continue to be subject to effluent standards." J.A. 535a. Section 404(f), however, makes no mention of the effluent limitations or performance standards of Section 301(e) or Section 306(e), but instead specifically refers to a different set of standards—Section 307's "Toxic and pretreatment effluent standards," 33 U.S.C. § 1317—that are not at issue in this litigation. *See id.* § 1344(f).

and 306(e). It is well-established that "specific statutory language should control more general language when there is a conflict between the two." *Nat'l Cable*, 534 U.S. at 335; *see also Townsend v. Little*, 109 U.S. 504, 512 (1883) (explaining the "well-settled rule" that "general and specific provisions, in apparent contradiction . . ., may subsist together, the specific qualifying and supplying exceptions to the general"). The Ninth Circuit went out of its way to emphasize the broad language of Sections 301(e) and 306(e), describing these sections as imposing "blanket prohibitions" that apply to "*all*" and "*any*" discharges. J.A. 531a–32a. The court also specifically observed that, in contrast, "the permit scheme under § 404 is a *limited* permit program that applies *only* to dredged or fill material." *Id.* 530a–31a (emphases added). The court even relied, when addressing the allegedly conflicting regulations, on the canon of construction that the specific controls the general. *Id.* 548a (describing it as a "basic principle" of interpretation). The Ninth Circuit should have acknowledged, therefore, that to the extent the general prohibitions on discharges in Sections 301 and 306 appear to conflict with Section 404's specific exception that permits discharges of fill material as long as they comply with the water-quality requirements of Section 404(b)(1), Section 404 ought to control. *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . ., particularly when the two are interrelated and closely positioned, both in fact being parts of" the same statutory scheme.).

Sections 404(p) and 402(k) confirm this reading of the statute. These parallel provisions immunize holders of Section 404 or Section 402 discharge per-

mits from enforcement actions and citizen suits based on the permitted discharge, providing that compliance with the terms of the discharge permit "shall be deemed compliance" with substantive provisions and restrictions imposed by the Clean Water Act—but only the substantive provisions that apply to each type of discharge. Section 404(p), on the one hand, states that "[c]ompliance with a permit issued pursuant to this section . . . shall be deemed compliance . . . with [Sections 301, 307, and 403]." 33 U.S.C. § 1344(p). Section 402(k), on the other hand, provides that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance . . . with [Sections 301, 302, *306*, 307, and 403]." *Id.* § 1342(k) (emphasis added). Each of these provisions, in other words, confirms that the holder of a Clean Water Act permit, by complying with the permit, is complying both with the general command of Section 301(a) that "the discharge of any pollutant . . . shall be unlawful" without a permit, *id.* § 1311(a), and with the specific requirements applicable under the respective permit program. *Compare id.* § 1344(b), (f), & (h)(1)(A) (showing that the Section 404(b)(1) guidelines and Sections 307 and 403 apply under Section 404), *with id.* § 1342(a) (requiring that Section 402 permits comply, "notwithstanding [Section 301(a)]," with "all applicable requirements" of Sections 301, 306, 307, and 403). Notably, Section 404(p) does not address requirements inapplicable under Section 404 (such as Section 306), just as Section 402(k) does not address requirements inapplicable under Section 402 (such as the Section 404(b)(1) guidelines).

b. The legislative history confirms that Congress intended for fill material to fall within the Corps' domain. The Senate bill originally proposed in 1972

to amend the existing Federal Water Control Act did not include a Section 404 or any program addressing discharges of fill material. *See* S. 2770, 92d Cong. §§ 402–501 (1971). When an amendment containing an early version of Section 404 (which addressed only dredged material, not fill material) was proposed, the bill's sponsor, Senator Muskie, opposed it on the ground that "[s]poil disposal is a pollutant" and that anyone wishing to dispose of spoil in navigable waters should be required "to get a permit from EPA or the State, just as would be required for other discharges." Senate Debate on S. 2770 (Nov. 2, 1971), *reprinted in* 2 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1388 (1972). Senator Muskie also objected that the proposed Section 404 would "shift the environmental evaluation authority from EPA to the Corps of Engineers." *Id.*

While that amendment failed in the Senate, an amendment proposed by the House included a Section 404 that proposed "a separate permit program for the discharge of dredged or fill material" and provided that "[t]his program would be administered by the Secretary of the Army, acting through the Chief of Engineers." S. Rep. No. 92-1236, at 141 (Conf. Rep.). The House version of Section 404, contrary to Senator Muskie's desire to have any and all discharges regulated by EPA, in fact provided that the Secretary of the Army "need not follow the designation of the [EPA] Administrator where the Secretary certifies there is no economically feasible alternative reasonably available." *See* Hearings on H.R. 11896 Before the H. Comm. on Public Works, 92 Cong. 308 (1971). Because the then-acting EPA Administrator "strongly oppose[d]" this version where permit grants would not be "subject to EPA review and concurrence

with respect to environmental considerations," *id.*, Section 404 was revised to provide EPA with a veto over the grant of a Section 404 permit. Senate Consideration of the Report of the Conference Committee (1972), *reprinted in* 1 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1972) ("the Conferees agreed that the Administrator of the [EPA] should have the veto"); *see also* 33 U.S.C. § 1344(c). But even as Congress backed away from giving the Corps exclusive authority over such discharges, Congress retained the proposed Section 404 program administered by the Corps, under guidelines developed by EPA in consultation with the Corps. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816, 884.

* * *

The Ninth Circuit's flawed construction of the Clean Water Act results directly from its cart-before-the-horse approach to statutory interpretation: The court started with the proposition that the two regulations potentially implicated by the discharge—that is, the froth-flotation effluent limitation and the regulation defining "fill material"—conflicted intractably and then interpreted the *Act* in light of those *regulations*. *See, e.g.*, J.A. 525a–26a ("Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern . . ., but they result in different interpretations of the Act."). If that were the law, then the promulgation of an EPA *regulation* setting out a new effluent restrictions on the discharge of rock, sand, and dirt (paradigmatic examples of fill material) could render meaningless a *statutory provision* (Section 404) and could negate Congress's clear intention to create a

Corps-administered permit program for discharges of fill material. Even without the EPA reaching that far, on the Ninth Circuit's view, the Section 404 permit program applies not to "fill material," but only to a residual subset of "fill material" not potentially implicated by any of the hundreds of effluent restrictions promulgated by EPA. *See* 40 C.F.R. subchapter N, pts. 400–71. But that is not the line EPA and the Corps drew in their notice-and-comment rulemaking defining the statutory term—in announcing its effects-based definition, EPA made clear that it "has *never* sought to regulate fill material under effluent guidelines," Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added)—and that line has not been challenged in this litigation.

II. The Ninth Circuit Erred By Rejecting The Corps' Construction Of Its Own Rule

It is well settled that a court must defer to an agency's construction of its own regulation—it has "controlling weight," *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)—unless that interpretation is "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The joint EPA-Corps Fill Rule defines "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States" and provides that a "discharge of fill material" "includes . . . placement of . . . slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)(1)(ii) & (f). Even while admitting that the proposed mine tailings discharge "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake," J.A.

526a, the Ninth Circuit held that the Corps' interpretation was unreasonable because it was inconsistent with the "regulatory history," which it found "dispositive." *Id.* 547a. Based on its reading of the regulatory history, the Ninth Circuit ascribed to the promulgating agencies an intent to apply their Fill Rule to "*only* . . . those tailings and other mining-related materials that are not subject to effluent limitations." *Id.* 546a (emphasis added). The Ninth Circuit erred both in its methodology and its conclusion. The Corps' interpretation of its Fill Rule (with which EPA concurred) was compelled by its text, amply supported by its history, and consistent with the Corps' historical treatment of mine tailings.

A. The Ninth Circuit Disregarded The Text Of The Fill Rule

The court of appeals began its regulatory analysis with the history of the Fill Rule. By relying on selected excerpts from the regulatory history, the Ninth Circuit appears to have adopted the position that an agency construction that is consistent with the *text* of the regulation may nonetheless be rejected as unreasonable if an examination of the regulatory *history* demonstrates that the text does not accurately reflect the agency's regulatory intent. *See* J.A. 535a ("Although the plain language of the Clean Water Act resolves the apparent regulatory conflict at the heart of this case, the regulatory history further demonstrates . . . .").

This is clearly wrong. The starting point for regulatory interpretation is the text itself—not the regulatory history—and "if the meaning of the words used is in doubt," "a court must necessarily look to the administrative construction of the regulation." *Seminole Rock*, 325 U.S. at 414. The "*only* tools,

therefore, are the plain words of the regulation and any relevant interpretations of the [relevant agency]." *Id.* (emphasis added).

In *United States v. Locke*, 471 U.S. 84 (1985), this Court explained that where statutory language "is plain and the agency's construction completely consistent with that language, the agency's construction simply cannot be found 'sufficiently unreasonable' as to be unacceptable." *Id.* at 96. The analysis of *Locke* applies with even greater force when, as here, an agency is construing not a statute but its own regulation; it is in that context that courts owe maximum deference to an agency's interpretation. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) (explaining that "this Court shows great deference to the interpretation given [a] statute by the . . . agency charged with its administration" and that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"); *see also Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to *further deference* when it adopts a reasonable interpretation of regulations it has put in force.") (citation omitted and emphasis added). Having conceded that the agencies' construction "facially meets" the joint Fill Rule, J.A. 526a, the court of appeals had no authority to set that interpretation aside. *See Locke*, 471 U.S. at 96.

Under *Seminole Rock* and *Auer*, the Ninth Circuit was required to interpret the Fill Rule by turning first to its text and then to the agencies' interpretation of their own regulation. The plain language of the Fill Rule defined "fill material" as any material

that "[c]hang[es] the bottom elevation of any portion of a water of the United States" and defined "discharge of fill material" to include "slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(e)(1)(ii) & (f). The Corps' issuance of a permit for the proposed discharge of a mine tailings slurry into Lower Slate Lake where it would have the effect of "rais[ing] the bottom elevation of the lake by 50 feet" is indisputably consistent with the Fill Rule's text. J.A. 519. The Ninth Circuit's acknowledgement that the proposed discharge "facially meets the Corps' current regulatory definition of 'fill material,'" J.A. 526a, therefore ought to have been both the beginning and the ending of the court's analysis.

B. The Regulatory History Confirms That Effluent Restrictions Do Not Apply To Discharges Of Fill Material, Including Mine Tailings

To determine whether the agencies reasonably could conclude that Coeur's proposed discharge of mine tailings was encompassed by the definition of "fill material" set out in the Fill Rule, the Ninth Circuit did not need to—and therefore lacked the authority to—look beyond the text of the Fill Rule itself. *See Seminole Rock*, 325 U.S. at 414. But even the "regulatory history" confirms that the agencies reasonably interpreted their regulation when they concluded that Coeur's proposed tailings slurry was "slurry, or tailings or similar mining-related materials" embraced within the definition of "discharge of fill material." 33 C.F.R. § 323.2(f).

The Ninth Circuit concluded that the Fill Rule applies to "*only* . . . tailings and other mining-related materials . . . not subject to effluent limitations," J.A. 546a (emphasis added), but the regulatory history

states that "[t]he language in today's final rule will clarify that *any mining-related material* that has the effect of fill when discharged will be regulated as 'fill material.'" Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added). The Ninth Circuit quoted statements in the regulatory history indicating that the agencies "did not intend to change their longstanding practice," J.A. 542a, but ignored the agencies' explanation of what that practice was: The agencies confirmed that the rule would "maintain [their] existing approach to regulating pollutants under *either* Section 402 *or* 404," that "[e]ffluent limitation guidelines and new source performance standards . . . are incorporated into permits issued under section 402 of the Act," that the Fill Rule would "not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs," and that "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphases added). The agencies even specifically addressed the type of discharge at issue here, noting that the words "slurry, or tailings or similar mining-related material" were added to the Fill Rule to "clarify that *any mining-related material* that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* (emphasis added).

Statements the agencies made in 2002 when responding to comments on a draft version of the Fill Rule further demonstrate the agencies' longstanding practice of applying effluent restrictions only under Section 402, not Section 404, and of regulating mining-related materials, such as tailings, under Section 404. The agencies noted that "mining by-products"—such as tailings—"resulting from mining beneficiation or the processing of mined materials" "may

have a slightly different physical form from the traditional rock and soil used as fill material, but [they] can have the same effect on the aquatic environment as those materials." J.A. 92a–93a. The agencies accordingly declared that where the discharge of mining by-products "will result . . . in . . . a change in the bottom elevation," it "clearly qualif[ies] as 'fill material' under this rule" and "will be regulated by the Corps under section 404 of the Act." *Id.* 93a. This statement echoes an earlier EPA statement, made in 1977 when EPA's Acting Administrator testified in a letter to Congress, that discharges of fill material *from mining operations* were regulated under Section 404: "Where mining requires . . . in-stream sediment control impoundments that involve discharges of material into water, individual and general [Section 404] permitting procedures are applicable." H. Rep. No. 95-139, at 62 (1977) (testimony about Section 404 during consideration of 1977 amendments to the Clean Water Act).

Indeed, when drafting the current Fill Rule, the agencies specifically considered and rejected a provision that would have had the same effect as the Ninth Circuit's ruling. The proposed version of the Fill Rule contained a provision that would have expressly excluded discharges governed by effluent restrictions from qualifying as fill material: "The term fill material does not include discharges covered by proposed or final effluent limitations guidelines and standards . . . ." Proposed Revisions, 65 Fed. Reg. at 21,299. The agencies, however, deleted this provision from the final Fill Rule. Final Revisions, 67 Fed. Reg. at 31,135 ("[T]oday's final rule also deletes the exclusion contained in the proposal for discharges covered by effluent limitation guidelines or standards or NPDES permits."). Rather than recog-

nizing this as evidence that the Fill Rule does not contain the exclusion, *see* J.A. 544a–45a, the Ninth Circuit reinserted that precise exclusion: "[T]he current fill rule only applies to those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance." *Id.* 546a; *compare id.*, *with* 33 C.F.R. § 323.2(e) & (f). But it is the version of the rule that was actually promulgated that controls, not the discarded draft. In fact, in 1985 this Court reversed a court of appeals that similarly rewrote a regulation defining a phrase ("waters of the United States") from the precise statute at issue here—Section 404 of the Clean Water Act. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court noted that the "history of the regulation underscore[d] the absence of [a particular requirement]" and concluded that the court of appeals, by "fashioning its own requirement," "improperly reintroduced into the regulation precisely what the Corps had excised." *Id.* at 130; *cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) ("when Congress deletes limiting language, 'it may be presumed that the limitation was not intended'" (quoting *Russello v. United States*, 464 U.S. 16, 23–24 (1983))).

Against all this, the Ninth Circuit latched onto selected snippets from the regulatory history in order to conclude that the "Corps' application of the fill rule in this case . . . contradicts its interpretation at the time the regulation was promulgated." J.A. 536a. But the statements that the Ninth Circuit relied on, *see id.* 542a–46a, support the court's analysis only if the agencies believed that mine tailings were not fill material—an assumption that is clearly false, *see* 33 C.F.R. § 323.2(f). Indeed, the statement that the Ninth Circuit found particularly compelling—

that "'if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] *under specific circumstances*, then that determination remains valid,'" J.A. 545–46a (quoting J.A. 48a) (some emphasis removed)—does not state a general rule, as the court would have it, that all mining-related materials are subject to effluent restrictions even if they have the effect of fill. Quite the contrary, it suggests only a limited exception to the rule the agencies stated in the preceding sentence of the regulatory history—that "the placement of 'overburden, slurry, or tailings or similar mining-related materials' is considered a discharge of fill material" and "is regulated under Section 404," *id.* 48a. That limited exception applies, as the agencies expressly noted, only in "specific circumstances" (for example, to effluent discharges *from* tailings impoundments or other settling ponds, or when EPA vetoes a Section 404 permit), not across the board.

C. The Corps Has Long Regulated Discharges Of Mine Tailings As Fill Material

SEACC, seeking to portray this case as "a one-time departure from long established practice," has contended that from 1982 "until 2005, the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill—or from any other source subject to EPA effluent limitations—into navigable waters." SEACC Opp. to Cert. Pet. 1–2. To the contrary, the Corps (in conjunction with EPA) has repeatedly, as the following examples from the 1980s, 1990s, and 2000s show, authorized Section 404 permits for mine tailings even when an EPA effluent limitation existed that could have applied—had the discharge not qualified as fill material—because of the processes used at the mines.

The Corps' interpretation of the Fill Rule is consistent with longstanding practices concerning the disposal of mine tailings, practices that have created settled expectations in the regulated community. As early as 1886, Congress directed that "the Secretary of the Army" may authorize "deposits of debris of mines" in navigable waters "where harbor-lines have not been established." 33 U.S.C. § 407a. And in 1977, as noted earlier, EPA's Acting Administrator testified to Congress that discharges of fill material from mining operations were regulated under Section 404: "Where mining requires . . . in-stream sediment control impoundments that involve discharges of material into water, individual and general [Section 404] permitting procedures are applicable." H. Rep. No. 95-139, at 62.

The Red Dog Mine in northwest Alaska—the largest zinc mine in the world—is an open-pit mine that uses a froth-flotation process to produce lead and zinc. C.A. J.S.E.R. 836. Since 1982, two effluent restrictions—one of which is the froth-flotation standard of performance at issue here—have been in place and could have been applied to the mine. *See* 40 C.F.R. § 440.102(a) (promulgated at Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598, 54617–18 (Dec. 3, 1982)) (effluent limitation for "mine drainage" for mines using "open-pit . . . operations"); *id.* § 440.104(b)(1) (promulgated at 47 Fed. Reg. at 54,619) (performance standard for "mills that use the froth-flotation process"). In its Final Environmental Impact Statement for the Red Dog Mine, EPA explained that a "[t]hickened tailings slurry from the mill concentrating process" would be fed "into the tailings pond." C.A. J.S.E.R. 1097. Despite the presence of effluent

restrictions relating to the mill source and despite observing that "the liquid portion" of the slurry "from the mill concentrating process" would "consist[] of excess *process water*," *id.* (emphasis added), the Corps granted a Section 404 permit in 1985 that authorized, to quote the permit itself, the discharge of "*mine tailings* in the south fork of Red Dog Creek," *id.* 979 (emphasis added).

The Fort Knox Mine is "an open pit gold mine near Fairbanks, Alaska." C.A. J.S.E.R. 983. The effluent limitation for open-pit mining mentioned above also applied to "mine drainage from mines," such as the Fort Knox Mine, "operated to obtain . . . gold bearing ores." 40 C.F.R. § 440.102(a). Despite the potentially applicable effluent limitation, the Corps in 1994 granted a Section 404 permit to the mine for the discharge of approximately 4.5 million cubic yards of "fill material into approximately 103 acres of waters of the United States" for a tailings impoundment. C.A. J.S.E.R. 983–86, 989; *see also id.* 985 (referring, in the conditions section of the permit, to the discharge of "tailings into the tailings impoundment").

Over the last twenty years, the Corps has also repeatedly reauthorized a nationwide permit for coal mining notwithstanding the existence of a related effluent restriction. In 1982, the Corps issued Nationwide Permit No. 21, which authorizes "discharges associated with surface coal mining activities." Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,833 (July 22, 1982). The Corps has continued reauthorizing this national Section 404 permit since 1982, *see, e.g.*, Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,184 (Mar. 12, 2007), despite the fact that

effluent restrictions have existed since 1985 for "discharges from any coal mine at which the extraction of coal is taking place or is planned to be undertaken and to coal preparation plants and associated area," 40 C.F.R. § 434.10 (promulgated at Coal Mining Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 50 Fed. Reg. 41,296, 41,305 (Oct. 9, 1985)). This nationwide permit authorizes discharges when "the district engineer makes a determination that the individual and cumulative adverse effects on the environment from such . . . discharges are minimal." Interim Final Rule, 47 Fed. Reg. at 31,833.

These examples demonstrate that for the past 23 years, the Corps has repeatedly authorized (and EPA has not vetoed) Section 404 permits for mining-related discharges when effluent restrictions existed—including the very performance standard at issue here—that could have been applied to the discharges. The agencies granted these Section 404 permits even in instances when "process water" was mixed in with the tailings. C.A. J.S.E.R. 1097. Indeed, an EPA memorandum written in 2004 to explain its regulatory approach to discharges of mine tailings used the Kensington mine as an example of how to apply the Fill Rule "to other comparable mining proposals." J.A. 142a n.1 (entitled "Clean Water Act Regulation of Mine Tailings"). The "Mine Tailings" memorandum states that EPA "believe[s] that the text of the rule makes clear that mine tailings placed into impounded waters of the U.S., as proposed by the Kensington mine project, are regulated under section 404 of the CWA as a discharge of fill material." *Id.* 144a. In fact, the "Mine Tailings" memorandum expressly recognized that "the regulatory regime applicable to discharges under section

402, including effluent limitation guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. pt. 440, subpt. J), do[es] not apply to the placement of tailings into the proposed impoundment." *Id.* 144a–45a (citing 40 C.F.R. § 122.3(b) ("Discharges of . . . fill material . . . which are regulated under section 404" "do not require [EPA] NPDES permits.")). As EPA wrote in promulgating the Fill Rule, "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

* * *

The court of appeals' refusal to defer to the agencies' interpretation of their own joint regulation wrested from the Corps and EPA the authority Congress delegated them to draw the line separating discharges of fill material from discharges of all other pollutants. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("[T]the power authoritatively to interpret its own regulations is a component of [an] agency's delegated lawmaking powers."). By substituting its policy preferences for those of the agencies charged with administering the Clean Water Act, the Ninth Circuit contravened this Court's guidance that Congress expects agencies' to make "substantive choices" when it "leaves the intersection of competing objectives . . . imprecisely marked." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002); *see also Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (agency interpretations that resolve "fundamental ambiguit[ies]" resulting from "differing mandates" in statutory texts by developing a "'reasonable interpretation' of the statutory scheme" are "entitled to deference"). And even aside

from the Ninth Circuit's lack of authority to make such policy judgments, there is no reason to think that the Ninth Circuit is better equipped than Congress, EPA, or the Corps—let alone all three—to decide how to balance interests in protecting the environment against interests in using natural resources, including "economic values" and "mineral exploitation." 33 U.S.C. § 1343(c) (setting out guidelines cross-referenced in Section 404(b)(1)).

CONCLUSION

The Ninth Circuit erred at each step of the way. Ignoring the structure and history of the statute, the court read the word "and" to require compliance with mutually exclusive provisions. It discounted the fact that Congress specifically enumerated different requirements and permitted general statutory provisions to trump specific ones. Refusing to defer to the agencies' construction of a regulation they drafted jointly, the court of appeals also made no attempt to reconcile its interpretation with the plain text of the Fill Rule. Instead, it searched the regulatory history for scattered phrases that could be construed to support SEACC's position, mischaracterized the approach consistently taken by the agencies for decades, and then wrote into the Fill Rule an exception the agencies specifically rejected.

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to vacate immediately the injunction pending appeal and to affirm the judgment of the district court.

Respectfully submitted.

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APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 301 of the Clean Water Act (Title 33 U.S.C. § 1311) provides, in relevant part:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

* * * * *

Section 306(e) of the Clean Water Act (33 U.S.C. § 1316(e)), provides:

§ 1316. National standards of performance

* * * * *

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 402 of the Clean Water Act (33 U.S.C. § 1342) provides, in relevant part:

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator

determines are necessary to carry out the provisions of this chapter.

* * * * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * * * *

Section 404 of the Clean Water Act (33 U.S.C. § 1344) provides:

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only

minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the

requirements of subparagraphs (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under

State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and

statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimi-

nation of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secre-

tary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also de-

scribe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of

a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such

State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is author-

ized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(l) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application

or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum

extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United

States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such

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[1] So in original. Probably should be "action."

State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

REGULATIONS INVOLVED

33 C.F.R. § 323.2 provides, in relevant part:

§ 323.2 Definitions.

For the purpose of this part, the following terms are defined:

* * * * *

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

* * * * *

40 C.F.R. § 122.3 provides, in relevant part:

§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

* * * * *

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

* * * * *

40 C.F.R. § 232.2 provides, in relevant part:

§ 232.2 Definitions.

* * * * *

Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement

of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; . . . and artificial reefs.

* * * * *

Fill material. (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

* * * * *

40 C.F.R. § 401.11 provides, in relevant part:

§ 401.11 General definitions.

* * * * *

For the purposes of Parts 402 through 699 of this subchapter:

* * * * *

(i) The term *effluent limitation* means any restriction established by the Administrator on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources, other than new sources, into navigable waters, the waters of the contiguous zone or the ocean.

* * * * *

40 C.F.R. § 434.10 provides, in relevant part:

§ 434.10 Applicability.

This part applies to discharges from any coal mine at which the extraction of coal is taking place or is planned to be undertaken and to coal preparation plants and associated areas.

40 C.F.R. § 440.102 provides, in relevant part:

§ 440.102 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology (BPT).

* * * * *

Except as provided in subpart L of this part and 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT):

(a) The concentration of pollutants discharged in mine drainage from mines operated to obtain copper bearing ores, lead bearing ores, zinc bearing ores, gold bearing ores, or silver bearing ores, or any combination of these ores open-pit or underground operations other than placer deposits shall not exceed:

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter	
TSS	30	20
Cu	.30	.15
Zn	1.5	.75
Pb	.6	.3
Hg	.002	001
pH	[1]	[1]

[1] Within the range 6.0 to 9.0.

* * * * *

40 C.F.R. § 440.104 provides, in relevant part:

§ 440.104 New source performance standards (NSPS).

Except as provided in Subpart L of this part any new source subject to this subsection must achieve the following NSPS representing the degree of effluent reduction attainable by

the application of the best available demonstrated technology (BADT):

* * * * *

(b)(1) Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores. The Agency recognizes that the elimination of the discharge of pollutants to navigable waters may result in an increase in discharges of some pollutants to other media. The Agency has considered these impacts and has addressed them in the preamble published on December 3, 1982.

(2)(i) In the event that the annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility exceeds the annual evaporation, a volume of water equal to the difference between annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility and annual evaporation may be discharged subject to the limitations set forth in paragraph (a) of this section.

(ii) In the event there is a build up of contaminants in the recycle water which significantly interferes with the ore recovery process and this interference can not be eliminated through appropriate treatment of the recycle water, the permitting author-

ity may allow a discharge of process wastewater in an amount necessary to correct the interference problem after installation of appropriate treatment. This discharge shall be subject to the limitations of paragraph (a) of this section. The facility shall have the burden of demonstrating to the permitting authority that the discharge is necessary to eliminate interference in the ore recovery process and that the interference could not be eliminated through appropriate treatment of the recycle water.

* * * * *

AMICUS CURIAE BRIEF

84

No. 07-984

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

OEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA
CONSERVATION COUNCIL, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit erred in not giving deference to the joint interpretation of the Clean Water Act by the United States Army Corps of Engineers and the Environmental Protection Agency, and to the definition of "fill material" adopted by those agencies, effectively reallocating the Corps' and EPA's authority under the Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
IDENTITY AND INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	6
I. STATUTORY AND PROCEDURAL BACKGROUND	6
A. The Clean Water Act Provides For Two Permitting Schemes For Discharges Into Waters Of The United States	6
B. The Agencies Correctly Interpreted The CWA	8
II. THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* BECAUSE THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *CHEVRON*	10
A. *Chevron* Emphasizes Deference To Democratically Accountable Agencies	10
B. The Instant Case Is On All Fours With *Chevron*, Requiring Deference From The Panel	12
C. Given The Interchangeable Nature Of "And" And "Or" In Statutory Construction, The Panel's Focus On The Use Of "And" In CWA Section 301 Is Not An Adequate Basis To Find That The Agency's Interpretation Is Contrary To Congressional Intent	15

TABLE OF CONTENTS – Continued

Page

III. THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* BECAUSE THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *SEMINOLE ROCK* 17

IV. CONSIDERATIONS OF THE IMPACT OF THE NINTH CIRCUIT'S DECISION ON THE MINING INDUSTRY AND THE ECONOMIES OF THE WESTERN STATES UNDERSCORE THE NEED FOR THIS COURT TO GRANT THE WRIT OF *CERTIORARI* 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 17

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) ..... *passim*

Brown v. United States, 113 U.S. 568 (1885) 10

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County, 529 U.S. 576 (2000) 18

De Sylva v. Ballentine, 351 U.S. 570 (1956) 15

Entergy Services, Inc. v. FERC, 375 F.3d 1204 (D.C. Cir. 2004) 20

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) 7

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 14

National Ass'n of Home Builders v. Defenders of Wildlife, ___ U.S. ___, 127 S.Ct. 2518 (2007) 2

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 2

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) 18

Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208 (2006) 2, 7

TABLE OF AUTHORITIES – Continued

Page

Ratzlaf v. United States, 510 U.S. 135 (1994) 5, 20

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) 2

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 486 F.3d 638 (9th Cir. 2007) .....*passim*

Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994).....18, 19

United States v. Fisk, 70 U.S. 445 (1865) 15

United States v. Hagberg, 207 F.3d 569 (9th Cir. 2000).....5, 20

United States v. Larionoff, 431 U.S. 864 (1977).....17

United States v. Shimmer, 367 U.S. 374 (1961).....10

Wards Cove Packing Corp. v. National Marine Fisheries Service, 307 F.3d 1214 (9th Cir. 2002).....18

STATUTES

5 U.S.C. § 701 *et seq.* (Administrative Procedure Act).....8

33 U.S.C. §§ 1251-1387 (Clean Water Act).....2

33 U.S.C. § 1311.....6

33 U.S.C. § 1311(a).....6, 15

33 U.S.C. § 1316 6

33 U.S.C. § 1342 .....3, 6

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1342(a)(1) 6, 7, 16

33 U.S.C. § 1343(c) 12

33 U.S.C. § 1344 ..... 3, 6

33 U.S.C. § 1344(a) 6

33 U.S.C. § 1344(b) 12

33 U.S.C. § 1344(b)(1) 7

REGULATIONS

33 C.F.R. § 323.2(e) 3, 4, 8, 19

33 C.F.R. § 323.2(f) 8

40 C.F.R. § 232.2 ..... 3, 4, 8

RULE

Supreme Court Rule 37(2)(a) 1

OTHER AUTHORITIES

67 Fed. Reg. 31,129 (May 9, 2002) 7

Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49 (2000) 18, 19, 20

U.S. Geological Survey, Mineral Commodity Summaries 2007 22

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Petitioner. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has actively participated in litigation to ensure the proper interpretation

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Mountain States Legal Foundation's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Mountain States Legal Foundation, its members, or its counsel made a monetary contribution to its preparation or submission.

and application of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251-1387, *e.g.*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor), *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208 (2006) (*amicus curiae*); *National Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S.Ct. 2518 (2007) (*amicus curiae*), including the instant case through its filing of an *amicus curiae* brief with the Court of Appeals in support of Appellee urging affirmance of the District Court's decision and the filing of an *amicus brief* urging the Court of Appeals to grant the petitions for rehearing *en banc*.

In addition, MSLF has over 5,000 members throughout the United States. Many of these members are engaged in mining activities that require them to secure permits under the CWA. These members will be directly affected if the decision of the Court of Appeals is allowed to stand as the decision severely restricts these members' ability to utilize a permitting scheme that Congress designed exclusively for the "discharge of dredged or fill material." Accordingly, MSLF respectfully submits this *Amicus Curiae* Brief in support of the petition for writ of *certiorari*.

SUMMARY OF THE ARGUMENT

The CWA provides two mutually exclusive permitting schemes for the discharge of pollutants into the waters of the United States. Permits are issued under either section 402 or section 404 of the CWA. 33 U.S.C. § 1342 and 1344. Section 404 of the CWA allows the U.S. Army Corps of Engineers ("Corps") to issue permits, with concurrence of the Environmental Protection Agency ("EPA"), for discharges of "dredged or fill material." 33 U.S.C. § 1344. This gives the Corps the authority to protect the navigability of the waters of the United States, and protect waters of the United States from being replaced with dry land.

Because Congress left the term "fill material" undefined, the Corps and the EPA have defined this term, in rulemaking promulgated in 2002, to mean

> material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> * * *

33 C.F.R. § 323.2(e) (Corps' definition); 40 C.F.R. § 232.2 (EPA's definition).

Coeur Alaska was granted a permit by the Corps under section 404 for the discharge of slurry into Lower Slate Lake. The Southeast Alaska Conservation

Council, Sierra Club, and Lynn Canal Conservation (collectively "SEACC") challenged the issuance of this permit, claiming that section 402 governed the discharges. The District Court, following the standards of deference set forth by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), deferred to the agencies' interpretation of the definition of "fill material" under section 404, which included the slurry discharged by Coeur Alaska as it would undoubtedly "change the bottom elevation . . . of a water of the United States." Memorandum Decision, pet. app. at 53a; 33 C.F.R. § 323.2(e); 40 C.F.R. § 232.2. The Panel reversed with a mandate that the permit be revoked, stating that the discharges should have been regulated under the effluent limitations and performance standards of section 402. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2007) ("*SEACC*").

The Panel should have followed the holding in *Chevron* and deferred to the agencies' interpretation of the CWA and the regulations that have been promulgated defining its terms. *Chevron* requires courts to perform a two-step analysis to determine whether Congress has spoken directly to the question in issue, and, if Congress has not spoken directly to the issue, to determine whether the agency's interpretation is a permissible construction of the statute. 467 U.S. 837 (1984). The Panel found correctly that Congress had left a gap in the statute for the agency to fill when it did not define "fill material." The Panel, therefore,

should have proceeded to defer to the agencies' interpretation as there is no evidence that their definition was an impermissible construction of the statute.

The Panel also should have followed this Court's ruling in *Bowles v. Seminole Rock & Sand Co.*, which held that courts should give controlling weight to an agency's interpretation of its own regulation when that interpretation is not inconsistent with the plain language of the statute or, in the case of an ambiguous statute, is not "plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. Rather than defer to the agencies' interpretation, which was consistent with the plain language of the regulations, the Panel looked to various pieces of legislative history to create ambiguity and find that the agencies' interpretation is invalid. Looking to legislative history when the language is unambiguous is contrary to this Court's holding regarding statutory interpretation in *Ratzlaf v. United States,* 510 U.S. 135, 147-149 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."), and also contrary to the Ninth Circuit's own precedent regarding interpretation of regulations. *United States v. Hagberg*, 207 F.3d 569, 574 (9th Cir. 2000) (holding that statements in the regulatory history cannot alter the meaning of an unambiguous regulation).

The petitioner's request for a writ of *certiorari* should be granted because the Panel should have deferred to the agencies' interpretation of the CWA and the defining regulations.

ARGUMENT

I. STATUTORY AND PROCEDURAL BACKGROUND.

A. The Clean Water Act Provides For Two Permitting Schemes For Discharges Into Waters Of The United States.

The CWA expressly allows for the discharge of pollutants into the waters of the United States as long as the discharger holds a permit issued under one of the two permitting schemes established by the Act. 33 U.S.C. § 1311(a). The permitting schemes at issue here are found under sections 402 and 404 of the CWA. 33 U.S.C. §§ 1342 and 1344. The section 402 program is administered by the EPA and allows the EPA to issue permits for the discharge of pollutants as long as the discharge complies with other expressly enumerated provisions of the CWA. 33 U.S.C. § 1342(a)(1). Two of the expressly enumerated provisions are sections 301 and 306. *Id.* Section 301 requires that discharges from existing point sources comply with effluent limitations promulgated by the EPA. 33 U.S.C. § 1311. Section 306 requires that discharges from new sources comply with the EPA's technology-based "standards of performance" for that category of source. 33 U.S.C. § 1316.

The other major permitting scheme, the section 404 program, allows the Corps to issue permits, with the concurrence of the EPA, for "discharge[s] of dredged or fill material." 33 U.S.C. § 1344(a). Under this scheme, Congress provided for the protection of

water quality and the environment by requiring that all section 404 permits comply with guidelines developed by the EPA in conjunction with the Corps ("Section 404(b)(1) Guidelines"). 33 U.S.C. § 1344(b)(1).

Importantly, these two permitting schemes are mutually exclusive. Indeed, the CWA expressly provides that discharges regulated by the section 404 program are not subject to the section 402 program. 33 U.S.C. § 1342(a)(1) (providing that the EPA may issue permits under section 402 "[e]xcept as provided in" section 404); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004) (a party whose activity is governed by the section 404 program "is not . . . subject to the [section 402] permitting requirements"); *see also Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 2228 (2006) (plurality opinion) (recognizing that the CWA provides for a separate permitting program, under section 404, for discharges of "dredged or fill material"). The determinative factor as to which of the two permitting schemes applies is whether the discharge will be "dredged or fill material" or some other pollutant. If the discharge is "dredged or fill material," then section 404 is the exclusive permitting scheme.

On May 9, 2002, the Corps and the EPA published joint regulations to "clarify the Section 404 regulatory framework" and to adopt uniform definitions of "fill material" and "discharge of fill material." 67 Fed. Reg. 31,129, 31,130 (May 9, 2002). Under these regulations, "fill material" is defined as "material placed in the waters of the United States where

the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e) (Corps definition); 40 C.F.R. § 232.2 (EPA definition). The two agencies also defined "discharge of fill material" to include the discharge of "overburden, slurry, or tailings or similar mining-related materials[.]" 33 C.F.R. § 323.2(f) (Corps definition); 40 C.F.R. § 232.2 (EPA definition).

B. The Agencies Correctly Interpreted The CWA.

Interpreting its own regulations, the Corps determined that Coeur Alaska, Inc.'s placement of mine tailings at the bottom of a Lower Slate Lake would be the discharge of "fill material." This determination was based on the fact that the placement of mine tailings at the bottom of the lake would "chang[e] the bottom elevation" of the lake. Accordingly, the Corps, with the concurrence of the EPA, issued a section 404 permit to Coeur Alaska.

SEACC sought judicial review of the Corps' issuance of the permit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* The District Court rejected SEACC's challenge to the Corps' permitting decision, upholding the Corps' and the EPA's regulations that define the terms "fill material" and "discharge of fill material" under the principles announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Memorandum Decision, pet. app.

at 53a. The District Court upheld the Corps' interpretation that these valid regulations authorized the issuance of the permit holding that substantial deference must be accorded to an agency's interpretation of its own regulations. *Id.* at 8-11.

In reversing the District Court, the Panel acknowledged that SEACC was not challenging the validity of the Corps' and the EPA's joint regulations that defined the terms "fill material" and "discharge of fill material." *SEACC*, 486 F.3d at 651, n.12 ("[W]e do not reach the validity of the regulations."). Moreover, the Panel repeatedly acknowledged that the proposed discharge "facially" satisfies the plain language of the Corps' regulatory definition of the term "fill material." *Id.* at 644 (The discharge "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake."); *id.* at 655 ("[T]he discharge in this case facially qualifies for the permitting scheme under § 404 of the [CWA]. . . ."). Nonetheless, the Panel rejected the Corps' interpretation of its own regulations, reversed the District Court, and remanded with instructions to vacate the section 404 permit. *Id.* at 655. In so doing, the Panel reallocated the respective permitting authority of the Corps and the EPA under the CWA and violated two well-established tenets of administrative law.

II. THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* BECAUSE THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *CHEVRON*.

A. *Chevron* Emphasizes Deference To Democratically Accountable Agencies.

This Court has long required that great deference be accorded to an agency's interpretation of a statutory scheme it is entrusted to administer. *E.g.*, *Brown v. United States*, 113 U.S. 568, 570-571 (1885); *United States v. Shimmer*, 367 U.S. 374, 381-383 (1961). In *Chevron,* this Court established the now well-recognized two-step analysis that a reviewing court must perform in order to implement this principle of deference:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-844 (footnotes omitted). Thus, if Congress's "silence" or "ambiguity" has "left a gap for the agency to fill," a court must defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Id.* at 842-843.

The deference required by the *Chevron* decision is based on the principle that courts are not in a position to second guess an agency's interpretation of a congressional mandate, where there is an ambiguity as to the legislative intent or where Congress intentionally left an issue to the discretion of the agency. Justice Stevens stated:

> Judges are not experts in the field, and are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within the gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency –

> have a duty to respect the legitimate policy choices made by those who do.

Id. at 865-866. This approach minimizes judicial interference with the democratic accountability of the executive branch. Furthermore, the EPA and Corps are much more knowledgeable than the courts in the areas of environmental protection and regulations as well as mining practices and Congress has specifically charged them with considering a variety of factors in issuing permits, including the effect of disposal of pollutants on human health or welfare, marine life, esthetic, recreation, and *economic values*, other possible locations and methods of disposal, and the effect on alternate uses of the water, such as *mineral exploitation*. 33 U.S.C. § 1343(c) (cross-referenced by 33 U.S.C. § 1344(b) as the type of criteria that section 404 guidelines should be based on). These factors put the agency in the best position to achieve balance between the competing interests in the discharge of pollutants and fill material. Congress left a "gap" in the statute for the expertise of the agency to fill and the court should defer to agency rulemaking that fills that gap and is not contrary to any clearly expressed Congressional intent.

B. The Instant Case Is On All Fours With *Chevron*, Requiring Deference From The Panel.

This case fits neatly within the scope of the *Chevron* decision. In *Chevron*, the statute in issue was the Clean Air Act, which regulated, but did not define, "stationary sources" of pollution. The EPA

defined a "stationary source" as including all pollution emitting activities belonging to the same industrial grouping and this Court held that the lower court should have deferred to that definition. *Id.* at 840-841. In the instant case, Congress similarly passed a statute for the regulation of "fill material" entering waters of the United States, the EPA promulgated a definition of "fill material," and the courts should defer to that definition.

Although SEACC was not challenging the validity of the regulations, *SEACC*, 486 F.3d at 651, n.12, the Panel essentially rewrote the regulations because they did not conform to the Panel's novel interpretation of the highly technical and complex provisions of the CWA. Specifically, the Panel held that discharges that fell within the Corps' and the EPA's definition of "fill material" could not be considered "fill material" if those discharges were also subject to an EPA effluent limitation or standard of performance. *Id.* at 646-648. Thus, after the Panel's decision, the agencies' joint definition of "fill material" now essentially reads:

> The term "fill material" means material placed in waters of the United States where the material has the effect of . . . changing the bottom elevation of any portion of a water of the United States, *unless the material may also be subject to an EPA effluent limitation or standard of performance.*

For all practical purposes, the Panel invalidated the Corps' and the EPA's carefully crafted joint regulations and replaced them with its own rule. This

replacement reorganizes the spheres of authority of the Corps and EPA, effectively minimizing the congressionally authorized role of the Corps in regulating the waters of the United States. Under this rule, the EPA will have permitting authority over any discharge that may fall within a performance standard or effluent limitation under section 402 of the CWA.

In *Chevron*, however, this Court held that a reviewing court may invalidate regulations duly promulgated by the agency charged with administering a statute only "if Congress has spoken to the precise question at issue" and the agency's regulation directly conflicts with "the unambiguously expressed intent of Congress." 467 U.S. at 842-843. Here, Congress was silent as to the meaning of the operative terms in section 404, *i.e.*, "fill material" and "discharge of fill material." Congress's silence on the meaning of these terms indicates that Congress implicitly granted authority to the Corps and the EPA to fill this "gap." *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 441-444 (4th Cir. 2003) (concluding that Congress's silence on the definition of "fill material" created an ambiguity for the Corps and the EPA to resolve).

Although the Panel recognized that Congress had not "spoken to the precise question at issue" and, thus, left a "gap" for the Corps and the EPA to fill, *see SEACC*, 486 F.3d at 649, the Panel invalidated the joint regulations under step one of *Chevron*. *Id.* at 644-648. The Panel's actions were in direct conflict with *Chevron*. Indeed, if Congress has left a "gap" for

the agency to fill, a reviewing court must proceed to step two to determine whether the agency's attempt to fill that "gap" was based upon a "permissible" construction of the statute. *Chevron*, 467 U.S. at 843-844. The Panel, instead, invalidated the joint regulations before it made it to step two. *SEACC*, 486 F.3d at 644-648. Although the Panel stated that its own interpretation of the regulation was permissible, it did not find that the Corps' interpretation was impermissible under step two of the *Chevron* test. *Id.* at 651 n.13.

C. Given The Interchangeable Nature Of "And" And "Or" In Statutory Construction, The Panel's Focus On The Use Of "And" In CWA Section 301 Is Not An Adequate Basis To Find That The Agency's Interpretation Is Contrary To Congressional Intent.

In reaching its decision, the Panel focused on the use of the word "and" rather than "or" in CWA section 301(a). 33 U.S.C. § 1311(a). The Panel's rigid interpretation of the word "and" runs counter to the precedent of this Court holding that Congress often uses "and" and "or" interchangeably and the meaning of the word in a particular case should be derived from the context. *See De Sylva v. Ballentine*, 351 U.S. 570 (1956) (holding that in the context of an inheritance statute "or" should be read as "and"); *United States v. Fisk*, 70 U.S. 445 (1865) ("In the construction of statutes, it is the duty of the court to ascertain the

clear intention of the legislature. In order to do this, courts are often compelled to construe '*or*' as meaning '*and*,' and again '*and*' as meaning '*or*.'"). The Panel's reading of section 301, requiring discharges of fill material under section 404 to comply with effluent limitations and performance standards under section 402, implies that discharges must comply with every section of the statute listed in section 301, but section 402 clearly provides:

> *Except as provided in sections 1328 and 1344* of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title.

33 U.S.C. § 1342(a)(1). Nowhere does the plain language of section 402 indicate that it also applies to discharges under section 404. Reading section 301 to require compliance with sections 301, 306, 402, and 404 dramatically changes the current administrative practice of the CWA and the division of authority between the EPA and the Corps, shifting the bulk of the permitting responsibility to the EPA. The EPA's and Corps' reading of "and" as "or" in section 301 is a permissible reading and should have received deference from the Panel under the test set forth in *Chevron*.

III. THIS COURT SHOULD ALSO GRANT THE WRIT OF *CERTIORARI* BECAUSE THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *SEMINOLE ROCK*.

In ordering the section 404 permit to be vacated, the Panel also ruled that the Corps erroneously interpreted its own regulatory definition of "fill material" in issuing the permit. *SEACC*, 486 F.3d at 648-653. In so doing, the Panel violated a tenet of administrative law older than *Chevron*.

Over sixty years ago, in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945), this Court articulated the now well-known rule of deference to an agency's interpretation of its own regulations:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . *[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*

(Emphasis added). This principle has become known as "*Seminole Rock* deference" and has been followed consistently by this Court. *E.g.*, *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In fact, adherence to this deference principle is especially important when, as

in the instant case, an agency is charged with administering:

> "[A] complex and highly technical regulatory program" in which the identification and classification of relevant "criteria necessarily require significant expertise and . . . the exercise of judgment grounded in policy concerns."

Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

Under *Seminole Rock,* when a court reviews an agency's interpretation of its own regulations, its analysis is similar to that which it performs when reviewing an agency's construction of statute under *Chevron*. Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 70-71 (2000) (hereinafter "*Shoring up Chevron*"). The first step is to determine whether the regulation is unambiguous. *Id*. If the regulation is unambiguous, a court will simply interpret the plain language of the regulation and hold unlawful an agency interpretation that is inconsistent with the plain language. *See id.*; *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (according no deference to an agency's interpretation that conflicted with its unambiguous regulation); *Wards Cove Packing Corp. v. National Marine Fisheries Service*, 307 F.3d 1214, 1219-1220 (9th Cir. 2002) (same). If, however, the regulation is ambiguous, then a court must proceed to the second step and

defer to the agency's interpretation, unless that interpretation "is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414; *Shoring up Chevron*, 34 U.C. Davis L. Rev. at 70-71.

In the instant case, neither SEACC nor the Panel suggested that the Corps' definition of the term "fill material" was ambiguous. This is not surprising because the language in the regulation could not be clearer: "fill material" means "material placed in the waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e). In fact, the Panel ruled that the proposed discharge in this case "facially" satisfied the Corps' definition of "fill material" "because it would have the effect of raising the bottom elevation of the lake." *SEACC*, 486 F.3d at 644. This ruling, in and of itself, should have resulted in the Panel affirming the District Court. Indeed, if an agency's interpretation of its own regulation is consistent with the unambiguous language of its regulation, a reviewing court must uphold the agency's interpretation. *See Thomas Jefferson University,* 512 U.S. at 512-518 (upholding an agency's interpretation of an unambiguous regulation).

The Panel, however, failed to follow the *Seminole Rock* analysis. Instead, the Panel erroneously looked at snippets of regulatory history and then concluded that the Corps could not have meant what it wrote in its regulatory definition of "fill material." *SEACC*,

486 F.3d at 648-653. Yet, it is axiomatic that, when the language of a statute is unambiguous, a court may not look to the legislative history in an effort to create an ambiguity. *Ratzlaf v. United States*, 510 U.S. 135, 147-149 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). If a court may not look to the legislative history in an effort to create an ambiguity in a statute, *a fortiori*, a court may not look to the regulatory history in an effort to turn an unambiguous regulation into an ambiguous one. *See United States v. Hagberg*, 207 F.3d 569, 574 (9th Cir. 2000) (statements in the regulatory history cannot alter the meaning of an unambiguous regulation); *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) ("[L]anguage in the preamble of a regulation is not controlling over the language of the regulation itself.") (quotation omitted).

In any event, even if the Panel properly consulted the regulatory history to find ambiguity in the definition of "fill material," that ambiguity simply means the Panel was required to apply step two of the *Seminole Rock* analysis. *Shoring up Chevron*, 34 U.C. Davis L. Rev. 49, 70-71. Under step two, a reviewing court must give "controlling weight" to an agency's interpretation of an ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414.

Here, the Corps' interpretation of its own regulations, as demonstrated by its issuance of the section

404 permit, was neither "plainly erroneous" nor "inconsistent" with its definition of "fill material." This is especially true considering that it is undisputed that placement of mine tailings at the bottom of the lake "would have the effect of raising the bottom elevation of the lake." *SEACC*, 486 F.3d at 644. However, instead of giving "controlling weight" to the Corps' interpretation of its own regulation as mandated by *Seminole Rock*, the Panel substituted its judgment for that of the Corps by creating its own interpretation of the Corps' regulation. *See SEACC*, 486 F.3d at 652-653 ("[T]he current fill rule only applies to those tailings or other mining-related materials that are not subject to effluent limitation or standards of performance."). Because the Panel's actions were in direct contravention of *Seminole Rock*, the petitions for rehearing *en banc* should be granted.

IV. CONSIDERATIONS OF THE IMPACT OF THE NINTH CIRCUIT'S DECISION ON THE MINING INDUSTRY AND THE ECONOMIES OF THE WESTERN STATES UNDERSCORE THE NEED FOR THIS COURT TO GRANT THE WRIT OF *CERTIORARI*.

If this decision from the Ninth Circuit is allowed to stand, it may have the effect of reallocating a significant amount of administrative authority between the Corps and the EPA – changing the permitting practice that has been in effect for the past several decades – and, at the least, will generate confusion as to which permit will be required for

mines and discharges of this type. A large percentage of the mining activity in the United States occurs in the Ninth Circuit and will be impacted by this change in the permitting practice. *See* U.S. Dep't of the Interior, U.S. Geological Survey, Mineral Commodity Summaries 2007, at 13, available at http://minerals.usgs.gov/minerals/pubs/mcs/2007/mcs2007.pdf. This decision will encourage similar challenges to permits granted to other mines, causing delays in mining productivity or rendering productivity impracticable as mines are unable to meet the effluent limitations and performance standards required under CWA sections 402, 301 and 306 as now incorporated in section 404 by the Ninth Circuit Panel. This will cause a loss of billions of dollars to the economies of the states that are now producing much of the non-fuel minerals in the United States. Mineral Commodity Summaries 2007, at 7 ("The total value of U.S. raw nonfuel mineral production alone was about $64.4 billion."). It is important that Coeur Alaska's petition for writ of *certiorari* be granted and that this reallocation of authority between the Corps and EPA and the vulnerability of the mining industry under this new permitting scheme be reviewed in light of the congressional intent to delegate the authority to define "fill material" and regulate its discharge primarily to the Corps in conjunction with EPA.

CONCLUSION

The permitting schemes under sections 402 and 404 of the CWA are mutually exclusive. The Corps' decision to issue a permit to Coeur Alaska for the discharge of slurry under the section 404 provision for "fill material" was consistent with the plain language of the CWA and the defining regulations, and was not "plainly erroneous." This Court should grant the petition for writ of *certiorari* to reinforce the rulings in *Chevron* and *Seminole Rock* and confirm that the permitting scheme under section 404 of the CWA is not rendered irrelevant by the effluent limitations and performance standards of section 402 of the CWA.

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AMICUS CURIAE BRIEF

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No. 07-984

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL MINING ASSOCIATION, ET AL. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE WRIT 6

I. THE NINTH CIRCUIT'S NEW RULE FUNDAMENTALLY MISUNDERSTANDS HOW MINES OPERATE AND HOW THEY HAVE BEEN HISTORICALLY REGULATED 6

A. American Mines Have Traditionally Used "Tailings Ponds" To Store The Wet Tailings Left Over From Their Operations 6

B. For At Least 30 Years, Federal Agencies Have Applied Effluent Limitations Only To The Discharges *From* Tailings Ponds, Not To The Deposits *Into* Tailings Ponds 8

II THE NINTH CIRCUIT'S READING OF THE ACT WILL MAKE IT NEARLY IMPOSSIBLE FOR MANY MINES TO LEGALLY STORE THEIR TAILINGS 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases:

Alaska Dep't of Envtl. Conservation v. *EPA*, 540 U.S. 461 (2004) 14

Barnhart v. *Walton*, 535 U.S. 212 (2002) 14

Bragg v. *West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001) 7

Kentuckians for the Commonwealth v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) 2, 14

National Mining Ass'n v. *Fowler*, 324 F.3d 752 (D.C. Cir. 2003) 2

North Haven Bd. of Educ. v. *Bell*, 456 U.S. 512 (1982) 14

Rapanos v. *United States*, 126 S. Ct. 2208 (2006) 17

Statutes:

33 U.S.C. § 1311 9

33 U.S.C. § 1316 9

33 U.S.C. § 1342 4

33 U.S.C. § 1344 4

33 U.S.C. § 1344(a) 15

33 U.S.C. § 1344(b) 15

Rules:

S. Ct. R. 37.2(a) 2

S. Ct. R. 37.6 2

TABLE OF AUTHORITIES—Continued

Page

Regulations:

33 C.F.R. § 323.2(e) 9, 15

33 C.F.R. § 323.2(f) 11

40 C.F.R. § 230.5 15

40 C.F.R. § 230.10(a) 15

40 C.F.R. § 230.70-77 15

40 C.F.R. § 232.2 11

40 C.F.R. § 434 18

40 C.F.R. § 434.22 18

40 C.F.R. § 436.182 18

40 C.F.R. § 440 18

40 C.F.R. § 440.104 10

40 C.F.R. § 440.104(a) 8, 18

40 C.F.R. § 440.104(b)(1) 15, 16, 18

47 Fed. Reg. 54,598 (Dec. 3, 1982) 10

55 Fed. Reg. 9210 (Mar. 12, 1990) 16

65 Fed. Reg. 21,292 (Apr. 20, 2000) 10, 11

67 Fed. Reg. 31,129 (May 9, 2002) 11

Other Authorities:

Coeur Alaska, Inc. Kensington Project: Slate Creek Lakes Tailings Storage Facility Report on Water Quality Monitoring (Feb. 2003) 7

TABLE OF AUTHORITIES—Continued

Page

Development Document for Final Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category, EPA No. 440/1-82/061 (Nov. 1982) 7

EPA, *Technical Resource Document: Extraction and Beneficiation of Ores and Minerals*, EPA 530-R-94-013 (Aug. 1994) 6

Mining Foundation of the Southwest, *Dry Tailings—An Alternative to Conventional Tailings Management* (2006) 8

National Mining Association, *The Economic Contributions of the Mining Industry in 2005* (2007) 2

Surface Mining (Bruce A. Kennedy, 2d ed. 1990) 19

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BRIEF AMICI CURIAE OF THE NATIONAL MINING ASSOCIATION, ET AL. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Mining Association ("NMA") is a national trade association that represents all aspects of the mining industry, including producers of most of

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. Pursuant to Rule 37.6, *amici* note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk.

America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced $78.4 billion of finished mineral, metal, and fuel products. These products were in turn used to create an additional $2 trillion worth of consumer and industrial goods. *See* National Mining Association, *The Economic Contributions of the Mining Industry in 2005*, at 3 (2007).

The NMA works with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. It also participates in litigation raising issues of concern to the mining community, *see, e.g.*, *National Mining Ass'n* v. *Fowler*, 324 F.3d 752 (D.C. Cir. 2003), and has been involved in cases, like this one, in which parties have attempted to challenge the jurisdiction of the Army Corps of Engineers (the "Corps") to issue permits for "fill material" under the Clean Water Act. *See, e.g.*, *Kentuckians for the Commonwealth* v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003).

Amici the Indiana Coal Council, Illinois Coal Association, Kentucky Coal Association, Coal Operators and Associates, Colorado Mining Association, West Virginia Coal Association, Pennsylvania Coal Association, Alabama Coal Association, Utah Mining Association, Arizona Mining Association, and New Mexico Mining Association represent the interests of

the coal and mining industries at the state level. Their goals are to provide effective industry leadership, enhance the industry's ability to compete, and educate citizens about the wise use of America's energy and mineral resources.

The *amici* have a substantial interest in this case. The Ninth Circuit's ruling below did not just get the Clean Water Act wrong; it got more than 30 years of industry practice and regulatory history wrong as well. By ignoring the practical realities that mines face in disposing of tailings—realities that Congress, the Corps, and the Environmental Protection Agency (EPA) all understood in creating separate regimes for effluent discharges and fill material—the Ninth Circuit embraced a rule that threatens to do great harm to America's miners. That is because the Ninth Circuit effectively adopted a categorical ban on a particular mining practice that the industry has relied on—and federal regulators have approved—for more than 30 years. Indeed, if permitted to stand, the Ninth Circuit's decision will leave some mines with nowhere to store the huge quantities of excess rock their operations produce. That will force those mines to cease operations—jeopardizing the economies of the States in which they operate and the livelihoods of the many men and women they employ. This Court should grant certiorari and reverse the Ninth Circuit's ruling on this exceptionally important question.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling was based on a fundamental misunderstanding of how mines actually operate and the unique regulatory framework that Congress, the Corps, and the EPA have fashioned to

account for those operations. For decades, mines have disposed of "tailings"—the wet, ground-up, excess rock and sand left over after ore is processed—by pumping them into segregated impoundments where they can settle over time. These impoundments, or "tailings ponds," are often created by damming an existing stream or pond and pumping the wet sand and rock particles into the enclosure for secure storage. The EPA and the Corps have consistently regulated discharges into such carefully engineered tailings ponds as "fill" under Section 404 (33 U.S.C. § 1344). By contrast, they have regulated liquid that might seep or drain *from* the tailings ponds into *other* bodies of water as "effluent discharges" under Section 402 (33 U.S.C. § 1342).

The panel ignored this important dichotomy. By overlooking the deliberate distinctions the EPA and the Corps drew between materials deposited *in* a secure and segregated tailings pond (the "fill" covered by Section 404) and the liquid that eventually may—or may not—flow *from* that isolated tailings pond (the effluent discharges covered by Section 402), the panel reached a result that upsets more than 30 years of regulatory history and industry practice.

Understanding how tailings are actually disposed of, and why Congress and the agencies treat "fill material" differently from effluent discharges, resolves the key concern that animated the Ninth Circuit's decision: that mines will be able to bypass EPA's effluent-discharge limits and indiscriminately discharge pollutants into American waterways so long as they mix them with a bit of tailings, call it "fill," and obtain a permit from the Corps under

Section 404. *See* Pet. App. 16a-17a; *see also* SEACC C.A. Br. 37. This parade of horribles will not come to pass if the Corps' "fill material" regulation is enforced as written. That is because, under Section 404, the Corps grants permits for tailings placements only when they will be deposited into secure impoundments that have been precisely engineered and designed for placements. And like their Section 402 counterparts, permits issued under Section 404 require mine operators to satisfy strict environmental standards—standards further buttressed by the EPA's authority to veto any Section 404 permit.

The Ninth Circuit's rule is also entirely unworkable. After all, tailings naturally contain materials—from iron to manganese to "suspended solids"—that are the subject of effluent limitations. And tailings ponds, by design, are filled with large quantities of these materials—in amounts that far exceed the strict parts-per-million limitations on effluent discharges that Section 402 establishes. The upshot of the Ninth Circuit's rule—which applies Section 402's effluent limitations even to tailings stored in secure, specially designed containments—is to effectively outlaw tailings ponds altogether. That result would not only conflict with settled industry and regulatory practice, but it would leave many mines with virtually no viable alternative and force them to shutter operations. The reason: In many areas of the country—particularly where much of the land is covered with wetlands and streams or criss-crossed with ephemeral drainages and similar bodies of water—the *only* feasible way to store tailings is in a tailings pond.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S NEW RULE FUNDAMENTALLY MISUNDERSTANDS HOW MINES OPERATE AND HOW THEY HAVE BEEN HISTORICALLY REGULATED.

Congress devised a separate Section 404 permitting scheme to account for the unique nature of fill material and industry practice. The EPA and the Corps likewise paid close attention to these practical aspects in fashioning a unique regulatory regime for "fill material." But the Ninth Circuit ignored this crucial history. That oversight led it to interpret the Clean Water Act in a way that not only belies that statute's language but also threatens to debilitate mining operations that the industry has used with regulatory approval for more than 30 years. This Court should grant the petition and reverse the Ninth Circuit on this extraordinarily important question.

A. American Mines Have Traditionally Used "Tailings Ponds" To Store The Wet Tailings Left Over From Their Operations.

Mining operations dislodge large amounts of rock and earth, only a small percentage of which contain ore. The initial process of separating ore-containing rock from the rest is called "beneficiation." *See generally* EPA, *Technical Resource Document: Extraction and Beneficiation of Ores and Minerals*, EPA 530-R-94-013 (Aug. 1994).[2] After beneficiation is complete, the ore-containing rock is shipped off for further processing; the material left behind is known

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[2] *Available at* www.epa.gov/epaoswer/other/mining/techdocs/gold.pdf.

as "tailings." Tailings are, as the Ninth Circuit acknowledged, nothing more than ground-up rock and earth. Pet. App. 4a. And they frequently have a muddy consistency because beneficiation often involves combining the mined rock and earth with water and chemicals in order to separate out ore-bearing materials. *See Development Document for Final Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category* 18-26, EPA No. 440/1-82/061 (Nov. 1982) ("1982 Development Document").[3] Some of that water remains mixed in the tailings after the process is complete, leaving the tailings in semi-solid or "slurry" form. *See* SER 295-296 (Knight Piesold Consulting, *Coeur Alaska, Inc. Kensington Project: Slate Creek Lakes Tailings Storage Facility Report on Water Quality Monitoring* 8-9 (Feb. 2003)).[4]

The mine, in short, is left with massive quantities of muddy, ground-up rock to dispose of. And while some of these tailings can be reinserted into the mine, many tons cannot. That is because "rock taken from its natural state and broken up naturally 'swells,' perhaps by as much as 15 to 25%." *Bragg* v. *West Virginia Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001). Mines therefore rely on storage facilities to hold the excess tailings. These facilities are sometimes on land. There, the tailings are dried and stacked in a designated area, creating a mound that may be 200 to 300 feet high. *See* Mining Foundation

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[3] *Available at* http://nepis.epa.gov/EPA/html/Pubs/pubtitleOAR.htm.

[4] "SER" refers to the Supplemental Excerpts of Record filed in the Court of Appeals.

of the Southwest, *Dry Tailings—An Alternative to Conventional Tailings Management* (2006).[5]

But depending on the surrounding topography and climate, many mines cannot employ this dry-stacking technique. For these mines, the solution for the last 30 years has been to build a "tailings pond." A tailings pond is made by (1) creating an embankment or a containment dam, often encircling an existing body of water, and then (2) pumping the wet tailings into the impounded area for storage. The tailings-pond method has several advantages. First, it avoids the creation of huge, unsightly mountains of tailings. Second (and as discussed further *infra* at 16-19), it may be the only feasible disposal technique in large portions of the country where the landscape is so heavily dotted with wetlands and streams or criss-crossed with ephemeral drainages that dry disposal is virtually impossible. And third, because the impoundment is securely walled off, it ensures that the solids and minerals in the tailings will not flow into a nearby water supply.

B. For At Least 30 Years, Federal Agencies Have Applied Effluent Limitations Only To The Discharges *From* Tailings Ponds, Not To The Deposits *Into* Tailings Ponds.

For many years, the EPA and the Corps have consistently taken a bifurcated approach to tailings ponds. On the one hand, they have authorized tailings deposits *into* the tailings ponds as "fill" under Section 404. On the other hand, they have

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[5] *Available at* http://www.mge.arizona.edu/pdf/MFSW_vol2_no3_ver1.pdf?PHPSESSID=bec59fef13c91fd3c649f66b0c6f4aa6.

applied Section 402 and its effluent limits[6] to any subsequent release of liquids *from* those tailings ponds that might reach non-impounded waters.

This regulatory dividing line makes good sense. Tailings (even wet tailings) are largely made up of rock and minerals. They cannot be assimilated into bodies of water like the microscopic effluents regulated under Section 402 can. Tailings instead displace water and create either dry land or a water body of a different size and shape. They therefore fall squarely into the regulatory definition of "fill material" that triggers Section 404 permitting: material that "has the effect of * * * [r]eplacing any portion of a water of the United States with dry land" or "[c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e). And because they are largely solid, the tailings cannot possibly meet Section 402's associated effluent limitations, which typically cap mineral and solids contents in water at some small number of parts per million. *See, e.g.*, 40 C.F.R. 440.104(a). These limitations, in short, were never meant to apply to tailings.

1. The EPA and the Corps have recognized for more than 30 years that mine operators, so long as they comply with Section 404, may cordon off small bodies of water and use them to store wet tailings as fill material in isolation from other water bodies. Throughout that time, the EPA and the Corps have likewise recognized that Section 402 and its associated effluent limitations do not apply to the discharge of tailings into those isolated tailings ponds.

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[6] *See* 33 U.S.C. §§ 1311, 1316.

Rather, Section 402 comes into play only if there is a discharge of pollutants from the tailings-storage facility into downstream waters.

The agencies have consistently hewed to this regulatory division of labor. In 1985, the Corps issued a Section 404 permit that authorized the Red Dog mine in Alaska to place lead and zinc tailings into an impoundment made from wetlands and a creek. *See* SER 836, 978-979. Even though the tailings were discharged as slurry, and even though there is an effluent limitation for discharges from lead and zinc mines, *see* 40 C.F.R. § 440.104, only a Section 404 permit was required for deposits into the tailings pond. Discharges from the tailings pond to adjacent non-impounded waters, however, were subject to Section 402. *See* SER 836. Likewise, in 1994 the Corps issued a Section 404 permit for the Fort Knox gold mine's tailings impoundment, made from a creek and adjacent wetlands. *Id.* at 837, 983-991. This tailings pond also did not require a Section 402 permit. *Id.* at 837.

This same regulatory approach to tailings ponds continued through the more recent EPA and Corps rulemaking. In the 2000 document proposing the current definition of "fill material," for instance, the agencies discussed a common technique by which excess coal-mining residue ("overburden") is placed in valley streams, with dammed "sedimentation ponds" built downstream to catch and isolate any runoff from the fill. *See* 65 Fed. Reg. 21,292, 21,295 (Apr. 20, 2000). The agencies wrote that the fill and the sedimentation ponds "should be regulated under CWA section 404"; by contrast, effluent subsequently "discharged into waters of the U.S. *from* sedimenta-

tion ponds" would require Section 402 permits. *Id.* at 21,295-96. And, of course, the final regulations confirm this approach in clear terms. The promulgating document stated that "EPA has *never* sought to regulate fill material under effluent guidelines," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002), and the regulations themselves define "discharge of fill material" to include "placement of overburden, *slurry*, or *tailings* or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2 (emphases added).

Finally, the Corps and EPA's longtime approach was never altered during the decade-long review of the Kensington project. In 1994, the EPA wrote that an earlier Coeur plan, which proposed building a tailings impoundment in a creek, implicated Section 402 in only one respect: "whether or not * * * a discharge *from the impoundment* would meet applicable effluent limits." *See* SER 446 (EPA, *Kensington Gold Mine Project: Technical Assistance Report for the U.S. Army Corps of Engineers Alaska District* v (Oct. 1994)) (emphasis added). In August 2004, the EPA likewise wrote that certain Section 402 requirements applied not to the tailings pond itself, but only to "discharge *from*" the pond "into East Fork Slate Creek." *See* SER 427 (EPA, *EPA's Detailed Comments on the Kensington Gold Project* (Aug. 2004)) (emphasis added). In June 2005, the EPA wrote that a Section 402 permit was required only for "discharge *from* the tailings storage facility." *See* SER 536 (EPA, *Record of Decision for Section 402 NPDES Permit* 3 (June 28, 2005)) (emphasis added). And in March 2006, the Corps noted that discharge of water to the downstream Slate Creek—but not discharge of wet tailings into the tailings pond—was

subject to a Section 402 permit. *See* SER 556 (Corps, *Record of Decision and Permit Evaluation* 2 (Mar. 29, 2006)).

2. Thus, until the Ninth Circuit's decision in this case, both regulators and industry enjoyed a clear understanding of how the Clean Water Act applies to tailings ponds: Section 404 applies to the discharge of tailings into segregated pools designed to capture pollutants, while Section 402 applies to the discharge of pollutants into downstream waters. That fundamental distinction—a distinction codified in the Act, recognized by federal regulation, and put to practice by industry—no longer exists in the Ninth Circuit.

The Court of Appeals all but acknowledged that its ruling was based less on what the EPA and the Corps' regulations require for fill material and more on its own sense of how the EPA and the Corps should regulate fill material. After all, the panel conceded that the agency's interpretation of its own regulation did indeed "facially meet[]" the regulation, but was nevertheless (somehow) "inconsistent with the regulation." Pet. App. 9a. It reached this curious—and plainly incorrect result (*see* Pet. 28-29)—based on its own freewheeling study of regulatory history and mining practice. The result of this effort was to conclude that, unless the agencies hewed to the court's own preferred interpretation of the Clean Water Act, mines would bypass the EPA's effluent-discharge limits and indiscriminately discharge pollutants into American waterways so long as they mixed them with a bit of tailings, called it "fill," and obtained a permit from the Corps under Section 404.

The Ninth Circuit's decision underscores the perils that ensue when judges freelance into matters that

Congress has assigned to expert executive agencies. For it not only misunderstood the history and industry practice that it purported to study, but those misunderstandings then led it to adopt a results-oriented interpretation aimed at preventing a parade of horribles that has never materialized during the past 30 years.

First, the panel's understanding of the regulatory history—a major underpinning of its opinion—was mistaken. Seemingly unaware of the traditional regulatory distinction between permits that regulate what goes into a tailings-storage facility and what escapes from it, the panel misunderstood the principal documents on which it relied. The panel, for example, concluded that the EPA and the Corps have always contemplated application of Section 402 to tailings deposits. In support of this conclusion, the panel wrote: "[A]s late as 2005, EPA informed Coeur Alaska that '[b]ecause this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project.' " Pet. App. 29a (citing EPA, *Record of Decision for Section 402 NPDES Permit* 3 (June 28, 2005)). The panel had the significance of this passage exactly backwards. The passage is part of a paragraph applying Section 402 and the effluent limitations only to discharges *from* the tailings pond, not *into* the tailings pond. *See* SER 536 ("The [NPDES] application addresses * * * the proposed discharge from the tailings storage facility (TSF) in Lower Slate Lake."); *see also id.* 539-540. The passage thus confirms what the Act and regulatory framework make clear: that Section 404 applies to discharges into a tailings-storage facility; Section 402 applies to discharges that escape from that facility.

Second, the panel's interpretation of the Act conflicts with the agencies' consistent understanding and application of the same provisions over the past 30 years. The panel concluded that "when a discharge is subject to an effluent limitation," it "must comply with * * * § 402." Pet. App. 17a. But that has never been so in the context of tailings deposited into impoundments—even when those tailings contain some moisture that, standing alone, might be deemed process water subject to effluent limitations. Instead, those wet tailings have long been permitted under Section 404. *See supra* at 8-16; *Kentuckians for the Commonwealth*, 317 F.3d at 431 (noting that "[t]he Corps' exercise of authority * * * to permit [valley fills that cover streams] in connection with mining operations was consistent with its past practices"). This longstanding interpretation is entitled to "particular deference." *Barnhart* v. *Walton*, 535 U.S. 212, 219-220 (2002) (citing *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 522 n. 12 (1982)); *see also Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 488 (2004) (refusing invitation to "reject as impermissible EPA's longstanding, consistently maintained interpretation"). The Ninth Circuit refused to accord the agencies' interpretation "particular deference" because of its own idiosyncratic reading of the regulatory record.

Third, the limiting principle that the Ninth Circuit feared missing from the agencies' interpretation has been present all along. Respondent SEACC argued, and the Ninth Circuit appeared to accept, that "[u]nder Defendants' interpretation of the Act, any waste byproduct from an industrial facility would escape effluent limits and performance standards if the discharge happens to contain a significant com-

ponent of suspended solids." SEACC Br. 37. But that is not so. For at least 30 years, the EPA and the Corps have required that the tailings be deposited in "specified disposal sites," 33 U.S.C. § 1344(a)—namely, in secure, impounded tailings ponds that prevent the liquid components of the deposit from commingling with surrounding waters. These tailings ponds accept huge quantities of crushed rock and dirt that indisputably change the bottom elevation and thus fall comfortably within the agencies' definition of "fill material." *See* 33 C.F.R. § 323.2(e). The Ninth Circuit's quest for a limiting principle is therefore unnecessary. Tailings ponds are well-regulated phenomena that bear no resemblance to the environmentally apocalyptic vision of companies dumping polluted water into open rivers and lakes and calling it "fill" based on some microscopic elevation change.

Moreover, it is important to recognize that Section 404 permits are not up for grabs for all comers. To the contrary, Congress mandated that the Corps must follow guidelines jointly promulgated by the EPA and the Corps. *See* 33 U.S.C. § 1344(b). Known as the 404(b)(1) Guidelines, these standards require the Corps to determine (i) whether aquatic impacts of a proposed discharge have been avoided to the extent practicable; (ii) whether any remaining impacts have been minimized; and (iii) whether the discharger should compensate for unavoidable losses through restoration, creation, enhancement, or preservation of aquatic resources. *See* 40 C.F.R. §§ 230.5; 230.10(a), (d); 230.70-77. As the EPA and the Corps have recognized, the 404(b)(1) Guidelines ensure that mining operations "avoid adverse impacts and offset unavoidable adverse impacts."

Army-EPA Memorandum of Understanding Concerning Mitigation Under Clean Water Act § 404(b)(1) Guidelines, *reprinted at* 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990). The Ninth Circuit was therefore exactly wrong to reject the agencies' longstanding interpretation out of a speculative and ill-defined concern that mines would be able to circumvent the Clean Water Act.

II. THE NINTH CIRCUIT'S READING OF THE ACT WILL MAKE IT NEARLY IMPOSSIBLE FOR MANY MINES TO LEGALLY STORE THEIR TAILINGS.

This is not a case in which an appellate court's error will have little practical effect. Just the opposite. The impact of the panel's newly minted rule will be devastating to the mining industry and, by extension, the economies of many States that depend on productive and environmentally responsible mines. That is because the Ninth Circuit's ruling effectively adopts by judicial fiat a categorical ban on an established industry practice that—if outlawed—would make it virtually impossible, or at least extraordinarily burdensome, for mines to legally dispose of tailings and other excess rock and dirt from their mining operations.

1. In large swaths of the nation where a significant proportion of American mines are located—Alaska, the mountain West, the arid Southwest, and portions of the Midwest and Appalachia—the terrain surrounding ore deposits is covered with wetlands and streams. In Alaska, for example, 170 million acres, or 43% of the State, consist of wetlands. *See*

Corps, Alaska District Website.[7] And in the Appalachian Mountains—stretching from Pennsylvania to Alabama and running through Kentucky, Virginia, and West Virginia—the bottom of mountain hollows are the only stable locations that mines have to place excess rock. As a basic matter of topology, these hollows naturally form streams, which in turn, are regulated as waters of the United States under the Clean Water Act.

Mining operations throughout the country—from Alaska to Appalachia and many areas in between—will often have "no practicable alternative" other than to store tailings in impoundments created by walling off an existing pond, stream, or other wetland. SER 1043 (*Response to Comments Document for Final Rule Amending the EPA's and Corps' CWA § 404 Definitions of "Fill Material" and "Discharge of Fill Material"* 35 (May 3, 2002)). Indeed, that was the case with the Kensington mine. As petitioner Coeur Alaska explained to the panel below, even the "dry" tailings option contemplated in an earlier version of the Coeur plan would have involved "filling and permanently destroying more than 100 acres of wetlands—an area five times the size of Lower Slate Lake." C.A. Br. of Coeur Alaska 16. Given the broad reach of the Act, which extends not just to traditional navigable waters but also perhaps to all wetlands and streams with "sufficient nexus" to navigable waters to affect their "integrity," *Rapanos* v. *United States*, 126 S. Ct. 2208, 2249 (2006) (Kennedy, J., concurring in the judgment), most such

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[7] *Available at* http://www.poa.usace.army.mil/hm/default.htm.

wetlands are subject to federal permitting requirements.

2. The panel's statutory construction renders tailings ponds unpermittable in a wide range of situations. That is because the EPA has promulgated effluent limitations for a vast number of substances commonly present in the excess rock and dirt from mines located throughout the country. For example, process water from froth-flotation mills is governed by an effluent limitation not just for gold mining, but also for mining of copper, lead, zinc, silver, and molybdenum. *See* 40 C.F.R. § 440.104(b)(1). Likewise, coal processing operations are governed by effluent limitations capping the iron, manganese, and "total suspended solids" that may be present in the discharge. *See id.* § 434.22. Phosphate mines are governed by an effluent limitation that caps the total suspended solids that may be present in process water from those operations. *See id.* § 436.182. And the list goes on. *See generally id.* Pts. 434, 440. Under the panel's reading of the Act, the tailings produced by all such mines would be subject to effluent limitations, even though they cannot possibly meet those limitations. How, for example, is a tailings deposit that may be more than half solid to meet a "total suspended solids" limit measured in terms of parts per million?[8]

The bottom line is that, under the Ninth Circuit's approach, many mines could no longer use the long-accepted tailings-pond technology. And because the only other established disposal practice—dry-stacking—is topographically impossible or exorbi-

[8] *See* 40 C.F.R. § 440.104(a).

tantly cost-prohibitive in areas like Alaska, the mountain West, the arid Southwest, and portions of the Midwest and Appalachia, the Ninth Circuit's decision may make it impossible for these mines to legally dispose of their tailings. That result would not only undermine 30 years of industry practice; it would jeopardize a vital industry and the economies of the States in which these mines play such an important role. *See Surface Mining* 1 (Bruce A. Kennedy ed., 2d ed. 1990) ("Mining was the second of man's endeavors—agriculture was the first. Since prehistoric times, mining has been integral and essential to man's existence.").

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

106

Supreme Court, U.S.
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Nos. 07-984 and 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC., *Petitioner*,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA, *Petitioner*,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
Volume 1 of 2
(Pages 1a–286a)

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CERTIORARI GRANTED JUNE 27, 2008

07-984 271

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TABLE OF CONTENTS

Page

Volume I

A. Relevant Docket Entries from the United States Court of Appeals for the Ninth Circuit, No. 06-35679 ..... 1a

B. Relevant Docket Entries from the United States District Court for the District of Alaska, No. 1:05-CV-00012-JKS 12a

C. Response to Comments Document regarding Section 404 Definitions of "Fill Material" and "Discharge of Fill Material" (May 3, 2002) 22a

D. Kline Environmental Research, Kensington Project Lower Slate Lake Tailings Impoundment: Habitat Creation and Mitigation Plan (July 14, 2003) 128a

E. Memorandum from Ed Kline, Kline Environmental Research, to Susan Hitchcock, Corps of Engineers (Dec. 23, 2003) 131a

F. Memorandum from D. Regas, et al., EPA, to R. Smith, EPA Region X (May 17, 2004). 141a

G. Technical Memorandum from Ed Kline, Kline Environmental Research, to Rick Richins (Aug. 17, 2004) 150a

H. Letter from Dan Easton, State of Alaska Department of Environmental Conservation, to John Leeds III, Department of the Army (Dec. 6, 2004) 155a

I. Forest Service, Kensington Gold Project Final Supplemental Environmental Impact Statement (Dec. 2004) (excerpts) 159a

J. Forest Service, Kensington Gold Project 2004 Record of Decision (Dec. 2004) 207a

K. Coeur Alaska, Inc., Reclamation and Closure Plan for the Kensington Gold Project (May 5, 2005) 249a

L. Letter from Ron Klein, State of Alaska Department of Environmental Conservation, to Rich Richins, RTR Resource Management, enclosing Certificate of Reasonable Assurance (May 6, 2005) 256a

M. Corps of Engineers, Section 404 Permit (June 17, 2005) 266a

Volume II

N. EPA, Record of Decision: Kensington Gold Project, Section 402 NPDES Permit (June 28, 2005) 287a

O. EPA, NPDES Permit No. AK-005057 (July 28, 2005) 317a

P. Declaration of Joe Kahklen (Oct. 12, 2005) 332a

Q. Corps of Engineers, Revised Record of Decision (Mar. 29, 2006) 340a

R. Corps of Engineers, Section 404(b)(1) Evaluation for Kensington Gold Project (Mar. 29, 2006) 378a

S. Corps of Engineers, Section 404(b)(1) Evaluation for Cascade Point (Mar. 29, 2006) (excerpts) 434a

T. First Amended Complaint (Apr. 4, 2006) 459a

U. Opinion of the United States District Court for the District of Alaska (Aug. 3, 2006) 478a

V. Declaration of Randy Wanamaker (Aug. 15, 2006) 497a

W. Order of the United States Court of Appeals for the Ninth Circuit Granting Injunction Pending Appeal (Aug. 24, 2006) 509a

X. Order of the United States Court of Appeals for the Ninth Circuit Denying Motion to Vacate the Injunction Pending Appeal (Dec. 8, 2006) 511a

Y. Opinion of the United States Court of Appeals for the Ninth Circuit (May 22, 2007) 517a

Z. Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc (Oct. 29, 2007) 552a

AA. Order of the United States Court of Appeals for the Ninth Circuit Staying the Mandate (Nov. 14, 2007) 554a

AB. Order of the United States Court of Appeals for the Ninth Circuit Directing Preparation of Reclamation Plan (Nov. 26, 2007) 555a

APPENDIX A

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 06-35679

Docketed: 08/10/2006
Termed: 05/22/2007
Nature of Suit: 1893 Environmental Matters Southeast Alaska, et al v. USACE, et al
Appeal From: US District Court for Alaska, Juneau

Case Type Information:
1) civil
2) united states
3) null

Originating Court Information:
District: 097--1 : CV-05-00012-J-JKS
Trial Judge: James K. Singleton, Senior District Judge
Date Filed: 09/12/2005
Date Order/Judgment: 08/04/2006
Date NOA Filed: 08/07/2006

* * * * *

SOUTHEAST ALASKA CONSERVATION COUNCIL; SIERRA CLUB; LYNN CANAL CONSERVATION,

Plaintiffs - Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TIMOTHY J. GALLAGHER, Colonel, in his official capacity as District Engineer; LARRY L. REEDER, in his official capacity of Chief of the Regulatory Branch; DOMINIC IZZO, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); UNITED STATES FOREST SERVICE,

Defendants - Appellees

COEUR ALASKA, INC.; GOLDBELT, INC.; STATE OF ALASKA,

Defendant-intervenors - Appellees

AMERICAN RIVERS; CLEAN WATER ACTION NETWORK; COOK INLETKEEPER; EARTHWORKS; FRIENDS OF THE EARTH; NATIONAL WILDLIFE FEDERATION; NATURAL RESOURCES DEFENSE COUNCIL, INC.; OXFAM AMERICA; UNITED STATES PUBLIC INTEREST RESEARCH GROUP; WATERKEEPER ALLIANCE; MEMBERS OF

CONGRESS OF THE UNITED STATES, FRANK PALLONE, JR.; EARL BLUMENAUR; RAUL GRIJALVA; MAURICE D. HINCHEY; RUSH HOLT; MIKE HONDA; DENNIS KUCINICH; BETTY MCCOLLUM; JAMES A. MCDERMOTT; MARTIN T. MEEHAN; DONALD M. PAYNE; JANICE D. SCHAKOWSKY; CHRISTOPHER H. SHAYS; FORTNEY H. (PETE) START, JR.; NEW STUYAHOK TRADITIONAL COUNCIL; MOUNTAIN STATES LEGAL FOUNDATION; SOUTHEAST CONFERENCE; CITY AND BOROUGH OF JUNEAU; BERNERS BAY CONSORTIUM; NATIONAL MINING ASSOCIATION,

Amici Curiae

* * * * *

08/10/2006	8	Filed (filed per 8/24/06 order) Appellants Southeast Alaska Conservation, et al., emergency motion for injunction; exhibits; proposed order; served on 8/10/06 [5915052] (to MOATT)
08/14/2006	10	Filed appellee Coeur Alaska, Inc.'s "faxed" motion to strike plntfs' emergency motion for injunction pending appeal; served on 8/14/06 [5918608] (to MOATT) (hardcopy recvd 8/17/06)

* * * * *

08/18/2006	13	Filed federal appellees USACE, et al. "faxed" response in opposition to emergency motion for injunction pending appeal [5915052-1]; served on 8/18/06 (to MOATT) [06-35679] (hardcopy recvd 8/21/06)
		* * * * *
08/18/2006	15	Filed appellee Goldbelt, Inc.'s "faxed" response in opposition to emergency motion for injunction [5915052-1]; declaration of Randy Wanamaker; exhibits; served on 8/18/06 (to MOATT) [06-35679] (hardcopy recvd 8/22/06)
08/18/2006	16	Filed appellee Coeur Alaska, Inc.'s "faxed" response in opposition to emergency motion for injunction pending appeal [5915052-1]; served on 8/18/06 (to MOATT) [06-35679] (hardcopy recvd 8/21/06)
08/18/2006	17	Filed appellants Southeast Alaska, et al. "faxed" response in opposition to motion to strike emergency motion for injunction pending appeal [5918608-1]; exhibits; served on 8/18/06 (to MOATT) [06-35679] (hardcopy recvd 8/22/06)
		* * * * *
08/21/2006	20	Filed (filed per 8/24/06 order) Appellants Southeast Alaska

		Conservation, et al. "faxed" reply in support of emergency motion [5915052-1]; exhibits; served on 8/21/06 (to MOATT) [06-35679] (hardcopy recvd 8/24/06)
08/22/2006	21	Filed Appellee Coeur Alaska, Inc.'s "faxed" reply in support of its motion to strike [5918608-1]; served on 8/22/06 (to MOATT) [06-35679] (hardcopy recvd 8/23/06)
08/24/2006	24	Filed order MOATT (Alfred T. GOODWIN, Stephen R. REINHARDT,): * * * * [Order granting injunction pending appeal. *See* J.A. 458a.]
		* * * * *
9/14/2006	28	Filed original and 15 copies Appellant Southeast Alaska, et al's opening brief (Informal: n) 54 pages and five excerpts of record in 3 volumes; served on 9/12/06 [06-35679]
		* * * * *
10/04/2006	41	Filed original and 15 copies appellee Coeur Alaska, Inc.'s 51 pages brief, 2 vols of joint Supp EOR (w/federal appellees); served on 10/3/06 (PANEL) [06-35679]
10/04/2006	42	Filed original and 15 copies appellees' US Army Corps of Engineers, Timothy J. Gallagher, Larry L.

		Reeder, Dominic Izzo, US Forest Service's 42 pages brief, 2 vols. of joint Supp EOR (w/appellee Coeur Alaska); served on 10/3/06 (PANEL) [06-35679]
		* * * * *
10/06/2006	52	Filed original and 15 copies appellee State of Alaska's 19 pages brief; served on 10/6/06 (PANEL) [06-35679]
10/06/2006	53	Filed original and 15 copies intervenor- appellee Goldbelt, Inc.'s 16 pages brief; served on 10/3/06 [06-35679]
		* * * * *
10/24/2006	58	Filed original and 15 copies aplts Southeast Alaska, et al., reply brief, (Informal: n) 40 pages, and 5 supp'l excerpts in 1 vol.; served on 10/13/06 (panel already served) [06-35679]
		* * * * *
11/07/2006	67	Filed aple Coeur Alaska, Inc.'s urgent motion to vacate injunction pending appeal on or before 12/8/06; exhibits; served on 11/7/06 [6000308] (faxed to PANEL)
		* * * * *
11/22/2006	70	Filed Appellants Southeast Alaska, et al., response in opposition to Coeur Alaska's urgent

		motion to vacate injunction [6000308-1]; exhibits; served on 11/21/06 (fedex to PANEL) [06-35679]
11/30/2006	71	Filed Appellee Coeur Alaska, Inc.'s reply in support of its urgent motion to vacate injunction pending appeal on or before 12/8/06 [6000308-1]; served on 11/30/06 (faxed to PANEL) [06-35679]
12/04/2006	72	ARGUED AND SUBMITTED TO Procter R. HUG, A. W. TASHIMA, Susan P. GRABER [06-35679]
12/08/2006	73	Filed order (Procter R. HUG, A. W. TASHIMA, Susan P. GRABER,): Appellee Coeur Alaska, Inc.'s Urgent Motion Under Circuit Rule 27-3(b) to Vacate the Injunction Pending Appeal is denied. * * * * [*See* J.A. 460a.]
		* * * * *
05/22/2007	91	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Procter R. HUG, author; A. W. TASHIMA; Susan P. GRABER.) FILED AND ENTERED JUDGMENT. [06-35679]
		* * * * *

08/20/2007	101	[6265410] Filed original and 50 copies Appellee State of Alaska's petition for rehearing en banc, 18 p.pages; served on 8/17/07 (PANEL, ALL ACTIVE JUDGES AND INTERESTED SENIOR JUDGES) [06-35679]
08/20/2007	102	[6265430] Filed original and 50 copies Appellee Coeur Alaska, Inc. petition for rehearing en banc, 20 p.pages; served on 8/17/07 (PANEL, ALL ACTIVE JUDGES AND INTERESTED SENIOR JUDGES) [06-35679]
08/20/2007	104	[6267155] Filed original and 50 copies Appellee Goldbelt, Inc. petition for rehearing en banc, 13 p.pages; served on 8/17/07 (PANEL, ALL ACTIVE JUDGES AND INTERESTED SENIOR JUDGES) [06-35679]
08/27/2007	106	Filed order (Procter R. HUG, A. W. TASHIMA, Susan P. GRABER,): Plntfs-aplts are requested to file responses to Federal aples' petition for limited panel rehearing and each of the intvrs-aples' petitions for rehearing en banc. Responses are to be filed by 10/5/07. [06-35679]
		* * * * *
10/12/2007	115	Filed original and 3 copies Appel-

		lants Southeast Alaska, et al. response to federal aples' petition for limited panel rehearing [6265284-1]; served on 10/11/07 (to PANEL) [06-35679]
10/12/2007	116	Filed original and 50 copies Appellants Southeast Alaska, et al. response to petition for rehearing en banc of aple Goldbelt, Inc. [6267155-1]; 8 pages; served on 10/11/07 (PANEL, ALL ACTIVE JUDGES AND INTERESTED SENIOR JUDGES) [06-35679]
		* * * * *
10/23/2007	123	Filed orig & 50 copies of Aplts Southeast Alaska, et al. response to petitions for rehearing en banc of Coeur Alaska, Inc. and State of Alaska in 28 pgs; served on 10/11/07. (PANEL, ALL ACTIVE JUDGES & ANY INTERESTED SENIOR JUDGES PREVIOUSLY SERVED) [06-35679]
10/25/2007	128	Filed Appellants Southeast Alaska, et al. response in opposition to motion of Coeur Alaska, Inc. to file reply brief in support of petition for rehearing en banc [6325729-1]; served on 10/24/07 (faxed to PANEL) [06-35679]
10/29/2007	129	Filed order (Procter R. HUG, A. W. TASHIMA, Susan P. GRABER,

		): The panel has voted to DENY the federal aples' petition for limited panel rehearing... [6265284-1] The petitions for rehearing en banc are DENIED. [6265410-1], [6265430-1], [6267155-1] [06-35679]
		* * * * *
11/02/2007	133	Filed aple Coeur Alaska, Inc.'s motion to stay issuance of the mandate pending the filing and disposition for a petition for writ of certiorari; served on 11/2/07 [6339916] (faxed to PANEL)
		* * * * *
11/14/2007	139	Filed order (Procter R. HUG, A. W. TASHIMA, Susan P. GRABER,): * * * *[Order staying the mandate. *See* J.A. 503a.]
11/15/2007	140	Filed Appellants Southeast Alaska, et al. response in opposition to motion of Coeur Alaska, In.c, to stay issuance of the mandate [6339916-1]; exhibits; served on 11/14/07 (to PANEL) [06-35679]
11/26/2007	142	Filed order (Procter R. HUG, A. W. TASHIMA, Susan P. GRABER,): * * * *[Order re reclamation plan. *See* J.A. 504a.]
		* * * * *
06/11/2008	148	Filed order (A. WALLACE

		TASHIMA, SUSAN P. GRABER and PROCTER R. HUG) The parties are directed to provide a status report on the Government's reclamation plan, which was due May 1, 2008.
06/26/2008	149	Filed joint status report; served on 06/25/2008. (PANEL)
07/07/2008	150	Filed order (A. WALLACE TASHIMA, PROCTER R. HUG and SUSAN P. GRABER) In order to keep the court fully informed, we request the parties furnish three copies of the reclamation plan.
07/07/2008	151	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/27/2008. Supreme Court Number 07-984
07/08/2008	152	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/27/2008. Supreme Court Number 7-990. The case is consolidated with No. 07-984.
		* * * * *
07/23/2008	154	Filed an orig. & 4 copies Appellee Coeur Alaska, Inc.'s reclamation Plan. (fed-ex PANEL)

APPENDIX B

U.S. District Court
District of Alaska (Juneau)
CIVIL DOCKET FOR CASE #: 1:05-cv-00012-JKS

Southeast Alaska Conservation Council et al v. United States Army Corps of Engineers et al	Date Filed: 09/12/2005
Assigned to: James K. Singleton, Jr	Date Terminated: 08/03/2006
Case in other court: 9CCA, 06-35679	Jury Demand: None
Cause: 05:702 Administrative Procedure Act	Nature of Suit: 893 Environmental Matters
	Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
* * * * *		

04/04/2006	28	AMENDED COMPLAINT *(First)* against Timothy J. Gallagher, Larry L. Reeder, Dominic Izzo, U.S. Forest Service, United States Army Corps of Engineers, filed by Southeast Alaska Conservation Council, Sierra Club, Lynn Canal Conservation.(Schane, Demian) (Entered: 04/04/2006)
* * * * *		
04/05/2006	31	MOTION to Intervene by Coeur Alaska, Inc.. (Attachments: # 1 Text of Proposed Order Motion to Intervene# 2 # 3)(Berghoff, John) (Entered: 04/05/2006)
* * * * *		
04/06/2006	33	MOTION to Intervene by State of Alaska. (Attachments: # 1 Proposed Order# 2 Proposed First Amended Answer)(Heese, Ruth) (Entered: 04/07/2006)
* * * * *		

04/07/2006	38	MOTION to Intervene by State of Alaska. (Attachments: # 1 Proposed Order# 2 Proposed First Amended Answer)(Heese, Ruth) (Entered: 04/07/2006)
* * * * *		
04/07/2006	41	MOTION for Summary Judgment by Southeast Alaska Conservation Council, Sierra Club, Lynn Canal Conservation. (Attachments: # 1 Text of Proposed Order Proposed Order Granting Injunction# 2 # 3 # 4 # 5 # 6 # 7 # 8 # 9 # 10 # 11)(Schane, Demian) (Entered: 04/07/2006)
* * * * *		
05/03/2006	61	RESPONSE in Opposition re 41 MOTION for Summary Judgment filed by Goldbelt, Incorporated. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit # 8 Exhibit # 9 Exhibit # 10 Exhibit)(Crosby, David) (Entered: 05/03/2006)
* * * * *		

05/05/2006	67	RESPONSE in Opposition re 41 MOTION for Summary Judgment filed by State of Alaska. (Attachments: # 1 Exhibit State's A# 2 Exhibit State's B# 3 Exhibit State's C# 4 Exhibit State's D-I# 5 Exhibit State's D-II# 6 Exhibit State's E# 7 Exhibit State's F)(Leonard, Cameron) (Entered: 05/05/2006)
* * * * *		

05/05/2006	71	RESPONSE in Opposition re 41 MOTION for Summary Judgment filed by Coeur Alaska, Inc.. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10# 11 Exhibit 11, pages 1-34# 12 Exhibit 11, pages 35-68# 13 Exhibit 12# 14 Exhibit 13# 15 Exhibit 14# 16 Exhibit 15# 17 Exhibit 16# 18 Exhibit 17# 19 Exhibit 18# 20 Exhibit 19# 21 Exhibit 20# 22 Exhibit 21# 23 Exhibit 22# 24 Exhibit 23# 25 Exhibit 24# 26 Exhibit 25# 27 Exhibit 26, pages 1-30# 28 Exhibit 26, pages 31-55# 29 Exhibit 27# 30 Exhibit 28# 31 Exhibit 29# 32 Exhibit 30# 33 Exhibit 31# 34 Exhibit 32)(Berghoff, John) (Entered: 05/05/2006)
* * * * *		

05/05/2006	80	REPLY to Response to Motion re 41 MOTION for Summary Judgment filed by Southeast Alaska Conservation Council, Sierra Club, Lynn Canal Conservation. (Attachments: # 1 Exhibit 43# 2 Exhibit 44# 3 Exhibit 45# 4 Exhibit 46# 5 Exhibit 47, part 1# 6 Exhibit 47, part 2# 7 Exhibit 48, part 2# 8 Exhibit 48, part 2# 9 Exhibit 49# 10 Exhibit 50# 11 Exhibit 51# 12 Exhibit 52# 13 Exhibit 53# 14 Exhibit 54# 15 Exhibit 55)(Schane, Demian) (Entered: 05/18/2006)
* * * * *		
05/18/2006	104	REPLY to Response to Motion re 41 MOTION for Summary Judgment filed by Southeast Alaska Conservation Council, Sierra Club, Lynn Canal Conservation. (Attachments: # 1 Exhibit 43# 2 Exhibit 44# 3 Exhibit 45# 4 Exhibit 46# 5 Exhibit 47, part 1# 6 Exhibit 47, part 2# 7 Exhibit 48, part 2# 8 Exhibit 48, part 2# 9 Exhibit 49# 10 Exhibit 50# 11 Exhibit 51# 12 Exhibit 52# 13 Exhibit 53# 14 Exhibit 54# 15 Exhibit 55)(Schane, Demian) (Entered: 05/18/2006)

* * * * *		
08/03/2006	118	JUDGMENT that complaint is dismissed w/prejudice; judgment is entered in favor of Defendants . Signed by Judge James K. Singleton on 8/3/2006. (DPM,) (Entered: 08/04/2006)
08/04/2006	117	MEMORANDUM DECISION denying 41 Motion for Summary Judgment; granting 80 Cross-Motion for Summary Judgment; complaint is hereby DISMISSED w/prejudice . Signed by Judge James K. Singleton on 8/3/2006. (DPM,) (Entered: 08/04/2006)
08/04/2006	119	MOTION for Preliminary Injunction Pending Appeal (shortened time) by Southeast Alaska Conservation Council, Sierra Club, Lynn Canal Conservation. (Attachments: # 1 Proposed Order Granting Injunction Pending Appeal)(Waldo, Thomas) (Entered: 08/04/2006)
* * * * *		

08/07/2006	125	NOTICE OF APPEAL as to 117 Order on Motion for Summary Judgment by Southeast Alaska Conservation Council, Sierra Club, Lynn Canal Conservation. (Attachments: # 1 Civil Cover Sheet Civil Appeals Docketing Statement# 2 Exhibit Representation Statement)(Waldo, Thomas) (Entered: 08/07/2006)
* * * * *		
08/22/2006	136	RESPONSE in Opposition re 119 MOTION for Preliminary Injunction Pending Appeal (shortened time) filed by State of Alaska. (Attachments: # 1 Exhibit Hughes Declaration part 1# 2 Exhibit Hughes Declaration part 2)(Leonard, Cameron) (Entered: 08/22/2006)

08/22/2006	137	RESPONSE in Opposition re 119 MOTION for Preliminary Injunction Pending Appeal (shortened time) filed by Coeur Alaska, Inc.. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J# 11 Exhibit K# 12 Exhibit L# 13 Exhibit M# 14 Exhibit N# 15 Exhibit O# 16 Exhibit P)(Berghoff, John) (Entered: 08/22/2006)
08/22/2006	138	RESPONSE in Opposition re 119 MOTION for Preliminary Injunction Pending Appeal (shortened time) filed by Goldbelt, Incorporated. (Crosby, David) (Entered: 08/22/2006)
* * * * *		

08/23/2006	143	REPLY to Response to Motion re 119 MOTION for Preliminary Injunction Pending Appeal (shortened time) filed by Southeast Alaska Conservation Council, Sierra Club, Lynn Canal Conservation. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3)(Schane, Demian) (Entered: 08/23/2006)
* * * * *		

APPENDIX C

RESPONSE TO COMMENTS DOCUMENT FOR FINAL RULE AMENDING THE ENVIRONMENTAL PROTECTION AGENCY'S AND U.S. ARMY CORPS OF ENGINEERS' CLEAN WATER ACT SECTION 404 DEFINITIONS OF "FILL MATERIAL" AND "DISCHARGE OF FILL MATERIAL"

May 3, 2002

TABLE OF CONTENTS

3. Introduction 1
4. Background 1
   A. April 2000 Proposal 1
   B. The May 2002 Final Rule 2
5. Summary of and Responses to Comments on the April 2000 Proposal 2
   A. Overall Summary 2
   B. Purpose and Need for Proposed Rule Change 3
      1. Conforming Corps and EPA Definitions 4
      2. Eliminating Primary Purpose Test 6
      3. Eliminating Waste Exclusion 7
   C. Legality of Proposal 10
      1. Consistency with CWA and Regulatory Framework 11
      2. Consistency with the *Bragg* decision and effect on litigation 16
      3. Consistency with the case of *Resources Investment Inc. v Corps* 17
      4. Consistency of Proposal with Past Policy, 1986 Solid Waste MOA, and Other Agency Documents 25
   D. CWA regulation of activities related to mining practices 34
   E. Environmental Effects of Proposal 35
   F. Unsuitable Fill Material 38

G. NEPA Comments 40
H. Federalism 42
I. Economic Effects of Proposal 43
J. Suggested Alternatives or clarifications 44
1. Issue Guidance or revise MOA instead of modifying the rule 44
2. Eliminate primary purpose but retain waste exclusion 45
3. Clarify or delete effluent limitations guidelines 46
4. Explain effect on treatment of RCRA landfills 46
5. Modify reference to coal mining overburden in the definition of "discharge of fill material" 47
6. Expand the unsuitable fill category to supplement the waste exclusion 47
7. Miscellaneous Suggestions and comments 48
a. Combine piling regulation in same section as new fill definition 48
b. Create additional exemptions to compensate for the expansion in Corps jurisdiction 48
c. Effect on existing permits 48
d. Effect of rule on treatment of stormwater 49

e. Clarify when conversions, diversions, and waste treatment systems can be used to avoid jurisdiction 49

f. Private appropriation of public waters..... 50

g. Consistency between definitions of discharge of dredged material and discharge of fill 50

RESPONSE TO COMMENTS DOCUMENT FOR FINAL RULE AMENDING THE ENVIRONMENTAL PROTECTION AGENCY'S AND U.S. ARMY CORPS OF ENGINEERS' CLEAN WATER ACT SECTION 404 DEFINITIONS OF "FILL MATERIAL" AND "DISCHARGE OF FILL MATERIAL"[1]

May 3, 2002

1. Introduction

This Response to Comments Document was prepared as part of the joint rulemaking process in which the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) issued a final rule amending their respective Clean Water Act (CWA) section 404 regulatory definitions of "fill material" and "discharge of fill material." This rulemaking process was initiated on April 20, 2000. The comment period for the proposal closed on July 19, 2000, after a 60-day comment period had been extended for an additional 30 days. The agencies received over 17,200 comments on the proposal, including several hundred comments that were received after the close of the comment period, but were nevertheless considered. This document summarizes the major issues raised in the public comments and the agencies responses. This document is part of the Administrative Record supporting the agencies' final rule.

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[1] Hereinafter referred to as "the Response to Comments Document."

2. Background

A. April 2000 Proposal

In April 2000, the agencies proposed revisions to their respective definitions of "fill material" and "discharge of fill material," adopting a single effects-based definition for fill material and making conforming changes to the latter term. From 1977 until the issuance of the rule developed in this process, EPA and the Corps have had different definitions of the term "fill material." The Corps defined "fill material" based on the purpose of the activity. **Its definition of "fill material" adopted in 1977 read as follows: 'The term 'fill material' means any material used *for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, *as that activity is regulated under section 402 of the Clean Water Act*." 33 CFR 323.2(e)(2001) (emphasis added).**

In contrast, the EPA regulations at 40 CFR 232.2 defined "fill material" as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body *for any purpose*" (emphasis added). EPA's definition focused on the effect of the material (an effects-based test), rather than the purpose of the discharge in determining whether it would be regulated by section 404 or section 402.

The April 2000 proposed rule defined "fill material" as material that has the effect of replacing any portion of a water of the U.S. with dry land, or changing the bottom elevation of any portion of a water of the U.S. The proposal removed from the Corps'

definition the "primary purpose" test and the provision excluding pollutants discharged into water primarily to dispose of waste. The April proposal also would have excluded from the definition discharges subject to an EPA proposed or promulgated effluent limitation guideline or standard under CWA sections 301, 304, 306, or discharges covered under a NPDES permit under CWA section 402. Finally, the April proposal solicited comments on the idea of the agencies creating an "unsuitable fill" category in the regulations that would identify materials that the Corps District Engineer could determine were not appropriate as fill material and, consequently, refuse to process an application seeking authorization to discharge such material.

B. The May 2002 Final Rule

The final rule retains the "effects-based" approach of the proposal, defining "fill material" in both the Corps' and EPA's regulations as material placed in waters of the United States where the material has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water. The examples of "fill material" identified in the rule include rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters of the U.S. The final rule also includes an explicit exclusion from the definition of "fill material" for trash or garbage.

Today's final rule also includes several changes to the term "discharge of fill material." Most significantly, the term now includes the phrases "placement of fill material for construction or maintenance of any liner, berm, or other infrastructure

associated with solid waste landfills" and "placement of overburden, slurry, or tailings or similar mining-related materials." These phrases have been added to the definition of "discharge of fill material" to provide further clarification of the types of activities that will be regulated.

This final rule was developed after considering the comments provided on the April proposal.

3. Summary of and Responses to Comments on the April 2000 Proposal

A. Overall Summary

We received over 17,200 comments on the proposed rule, including several hundred late comments, most of which consisted of identical or substantially identical e-mails, letters, and postcards opposing the rule. (In April 2002, an additional several thousand letters and e-mails were sent opposing the adoption of a rule similar to the proposal.) Approximately 500 of the original comments consisted of more individualized letters, with a mixture of those comments supporting and opposing the rule. The comments of environmental groups and the various form letters were strongly opposed to the proposal, in particular, the elimination of the waste exclusion and the discussion in the preamble regarding treatment of unsuitable fill material. Except for several landfill representatives, comments from the regulated community generally supported the proposal, in particular, the fact that the rule would create uniform definitions of "fill material" for the Corps' and EPA's rules and maintain regulation of certain discharges under section 404 as opposed to section 402 of the CWA. While the above characterization reflects the general framework for the proponents and opponents of the rule, both raised a

number of specific issues that are identified and discussed below.

Because of the nature of the comments (e.g., many identical or substantially identical), we were able to categorize the comments by issue. We then summarized the comments addressing each issue and developed a response to the issue. Those summaries and responses are provided below. This document is organized by category, with the first part of the document (sections III. A - I) addressing issues raised about the proposal and the latter part of the document (section III J) reflecting alternative approaches or clarifications to the proposed rule that were recommended.

B. Purpose and Need for Proposed Rule Change

The comments received regarding the purpose and need for the proposed rule change reflect both support and opposition to the proposal. A significant number of those commenting support the agencies' effort to make consistent the Corps' and EPA's regulatory definition of "fill material," as well as their elimination of the primary purpose test in favor of an effects-based definition. However, many commenters expressed opposition to the proposed elimination of the waste exclusion from the definition of "fill material," and specifically asked that the "placement of coal mining overburden" not be added to those activities that can be authorized by the Corps as a "discharge of fill material." Many stated that the proposed rulemaking would "result in an unconscionable weakening of the Clean Water Act" by allowing the Corps to permit the deposition of waste into waters of the United States.

One commenter remarked that "the impetus for this proposed rule is the continued regulation of valley fills by the Corps, and not improved implementation of the Clean Water Act." Additionally, changes regarding the permitting of solid waste landfills could more appropriately be made through agency guidance or through "supplementing the 1986 MOA with clarifying terms."

One commenter was generally opposed to the proposed rule changes arguing that "they would serve as an unbelievable capitulation to coal companies" and would result in a weakening of existing clean water laws. Another stated that "instead of rewriting the rules to allow more fills and other discharges into the nation's waters," the Corps and EPA should strive to "uphold their Section 404 responsibilities in compliance with Clean Water Act goals."

Several commenters stated that the "proposed broadening of the Corps' jurisdiction is unwarranted," and concerns were expressed regarding the effect of the proposed rulemaking on the regulation of discharges from the on-board processing of sand and gravel by instream dredging operations, and on hard rock mining activities.

In light of the comments we received on the proposed rulemaking, we remain convinced of the fundamental need to reconcile the differing definitions of "fill material" in our regulations. We disagree with the assertion that the reconciliation of the definitions by adopting EPA's 25-year old effects-based approach somehow would weaken the CWA either by allowing waste disposal in waters or broadening jurisdiction. The fact that we have essentially implemented the EPA-based approach since 1977 discredits the notion that this rulemaking now

results in a change from past practice and allows impermissible waste disposal. Moreover, the suggestion that this rulemaking now provides a legal basis for previously illegal activities is not the case—no discharges that were previously prohibited are now authorized as a result of this rulemaking.

It is important to note, however, that we do agree with the sentiments expressed by many commenters opposed to the rule that the agencies need to do a more comprehensive job at implementing existing provisions of CWA section 404 as they pertain to the review and conditioning of permits for certain discharges, including those that result from mining activities. Guidance from Corps headquarters in 2000 and changes to Nationwide general permit 21 in 2002 are concrete actions that have been taken recently to improve implementation. The agencies also concur that additional environmental improvements under the CWA and under the Surface Mining Control and Reclamation Act should be evaluated, and we remain committed to completing the programmatic Environmental Impact Statement on Mountaintop Mining and Valley Fills to facilitate such reviews.

A majority of those commenting on the purpose and need for the rulemaking, whether or not they supported specific aspects of the proposal, supported the basic objective of unifying the definitions. As a matter of good government and reducing regulatory uncertainty, we agree that our definitions should be identical. We also believe that, for a single definition, maintaining EPA's long-standing effects-based approach, in lieu of one based on purpose, is preferable because it provides a more objective and predictable approach for ensuring that section 404, the regula-

tory regime best suited for controlling discharges with the effect of fill, is used. Likewise, elimination of the so-called "waste exclusion" from the Corps' definition is preferable as it is generally consistent with current agency practice and it does not expand the types of discharges that will be covered under the CWA section 404 program. Specific discussions of the purpose and need for the rule are provided below and organized under subheadings dealing with conforming the regulatory definitions, eliminating the primary purpose test, and eliminating the waste exclusion.

1. Conforming Corps and EPA Definitions

Regarding comments received concerning conforming Corps and EPA definitions through the proposed rulemaking, the majority of commenters were in support of making consistent the Corps' and EPA's regulatory definition of "fill material." One commenter stated, "it clears up longstanding confusion arising from the differing definitions of the two agencies, and therefore simplifies and clarifies the regulatory schemes and compliance obligations. Another noted that eliminating the current discrepancy between the EPA and Corps definitions of "fill material" will "improve the clarity and consistency of the Section 404 regulations, and will avoid the need for litigation predicated on the differences in the existing rules." Furthermore, another commenter states the current lack of consistency "has created the potential that, for certain kinds of discharges, there was no regulatory program pursuant to which authorization could be obtained."

One commenter "agrees that regulatory consistency among federal agencies implementing the

CWA is a good thing when done for the right reasons. However, a proposal to change the definitions, now purportedly to rectify misinterpretations by federal courts, does not make sense." The commenter cites several additional fill-related court cases that have not warranted a change in the regulations. Additionally, the commenter states, as proposed, "by regulating some types of mining wastes under the 402 program and others under the 404 program, they belie their claim that this proposal will retain current practice and resolve regulatory differences."

Although one commenter agreed that "appropriate clarifications will avoid the confusion and problems associated with the past differences in the definitions," the agencies have continually acted in a manner more consistent with the "effects" test than the Corps' "primary purpose" test. Another commenter states, "a unified definition will help eliminate confusion. Unfortunately, we believe the proposed definition, although similar to the current EPA definition, is difficult to interpret and apply to activities." One commenter speaks to the "regulatory uncertainty" caused by having inconsistent definitions of "fill material" by stating that there is "nothing uncertain about the current regulatory scheme" as it applies to the practice of valley fills. In keeping with the regulatory agencies' efforts to provide consistency, one commenter suggests that "the two agencies develop an identical list of every known type of fill material."

In light of the comments we received on the proposed rulemaking, we affirm our position that conforming the regulations by adopting a single definition is necessary and desirable. Importantly, as a matter of good government, we believe that a uni-

form definition will eliminate any uncertainty and confusion that may have been bred by different definitions applying to the same regulatory program. The final rule achieves this objective.

Specifically, in response to the commenter that disputed whether the proposed changes would resolve regulated community and court misinterpretations, we disagree. Although regulatory action is not the automatic result of relevant court decisions or confusion on the part of the regulated public, it is an appropriate response in the present situation. Not only had confusion on the part of the regulated community occurred, it was manifest in several court actions. In addition, these court actions did not impact one type of activity, but at least two-those of landfill construction and those of certain mining discharges. Moreover, the agencies had issued guidance to address the confusion in the regulated community, but issues continued to be raised. Given the significance of the issues and the less than successful attempts to resolve them short by guidance, a rulemaking to clarify the issue was warranted. While we can certainly not guarantee that every future issue is put to rest with the final rulemaking, the extensive nature of the comments received by the public has greatly assisted the agencies in addressing a wide variety of the final rule's implications.

In response to the specific comment regarding the suggestion that we develop a list of every known type of fill material, we conclude that this exercise would not be practicable. A number of examples of materials generally included and not included are provided in the final rule language and/or are discussed in the preamble. We note that the use of certain examples in the final rulemaking was a re-

sult of public comment to increase clarity. However, it is unlikely that a list of every known fill material could be generated, given the variety of materials that are or could be discharged. We are satisfied that the expanded discussion in the final rule language itself and the preamble is informative and representative, without being unwieldy.

2. Eliminating Primary Purpose Test

An overview of the comments received regarding the proposed elimination of the primary purpose test from the definition of "fill material" reveals both support and opposition. A significant number of those commenting supported the replacement of the Corps' "primary purpose test" with an effects-based definition.

One commenter noted the change to an effects-based test "will finally close an infamous loophole that has allowed wetlands to be filled as long as the permit applicant could point to a "primary purpose" other than fill (e.g., solid waste landfill or temporary road construction)." Another commenter stated, "removal of the primary purpose test and replacing it with the effects test will promote greater clarity and consistency in the regulatory approach for wetlands protection." They further stated that currently some discharges occur without permit authorization under either section 402 or section 404 of the CWA, a violation of section 301, as a result of the failure to regulate these fills because of the primary purpose test.

As discussed in the preamble to the proposed rule (65 FR 21,294-21,295), we agree that use of a "primary purpose test" to define fill material has caused confusion and engendered litigation, problems which can be substantially reduced or avoided

by use of a more objective effects-based test. With regard to comments on unpermitted discharges being a violation of section 301, this comment is outside the scope of the rule, which addresses the issues of how to define "fill material."

In contrast, another commenter asserted a "purpose-based test can be enforced fairly and in the public interest" particularly with regard to waste regulation. Also noted was the "inherent subjectivity of the wood chips example" discussed in the Public Notice. The commenter suggested that potential abuses in interpretation of a purpose-based test could be addressed through "consideration of the economics of the proposed commercial activity (particularly the costs of alternatives available to meet the intended purpose)." Another commenter also challenged concerns about the subjective nature of the determinations performed by the Corps in applying the primary purpose test. The commenter stated the Corps "is quite capable (evidenced by the fact that it has been doing it for years) to determine if the primary purpose is to get rid of waste or to construct a fill."

We do not agree that use of a primary purpose test is preferable to use of an effects-based test for a number of reasons. Our practical experience with use of a primary purpose test is that it does result in uncertainty and confusion, as for example, in the *RII* case. Although, as the commenter suggested, the Corps is capable of evaluating project purpose, such an evaluation nonetheless is subjective, does not ensure use of the most appropriate permitting regime, and as evidenced by *RII* is subject to a differing interpretation by the court. We believe that in assigning a discharge to section 404 versus section

402 permitting, it is important to apply the regulatory regime that is in fact best-equipped to consider and control the impacts of the potential discharge. Because section 404 and its implementing regulations are specifically designed to address discharges that fill waters of the U.S., we believe that it should apply to discharges that have such an effect, rather than looking to the primary purpose of the discharge. Although we agree that today's final rule does not eliminate all subjectivity (as in the wood chip example given above), use of an effects-based test does substantially improve clarity and objectivity compared to the subjective nature of a primary purpose test. With regard to the comment suggesting use of an economics-based approach to implement a purpose-based test, this would still assign discharges to section 404 versus section 402 on the basis of the purpose of the discharge, rather than on the basis of which regime is best-equipped to control the potential impacts. In addition, while use of an economics based approach could perhaps reduce some of the subjectivity associated with a purpose-based test, it does not do so to the degree that an effects-based test accomplishes, would require development of economic yardsticks which themselves would be subject to subjectivity, and would unnecessarily add a further degree of analytical complexity and information needs to the permitting process. We thus do not agree with comments favoring use or retention of a purpose-based test.

One commenter supporting the proposed change to an effects-based definition of fill stated it should not be up to the Corps District Engineers' discretion "to define what constitutes fill, or what constitutes effects." It was further suggested that, based on the CWA section 404(b)(1) Guidelines, "the Corps and

EPA should determine at the national level what structures, works and activities have the effect of fill."

We do not agree with these comments. Implementation of an effects-based test is best left to the permitting authority (e.g., for section 404, the District Engineer), as they are in the best position to know local conditions and ascertain a discharge's effects. In addition, by adopting a single consistent effects-based test, today's rule provides the permitting authority with an objective means for assessing the applicability of section 404 and helps ensure consistency between the Corps and EPA in determining what constitutes "fill material." With regard to the suggestion that a national level determination should be made as to what activities or works have the effect of fill, it is not feasible to come up with a comprehensive or exhaustive list, and use of an effects-based test instead both improves clarity while still being sufficiently broad to encompass the full range of materials that should be treated as "fill material." We also note that as described in the preamble to today's rule, additional examples of "fill material" and the "discharge of fill material" have been added to the final rule.

One commenter indicated that "while an 'environmental effects' test may be appropriate to the definition of 'fill material' in the Section 402 program, it is not necessarily similarly appropriate to the definition of 'fill material' in the Section 404 program, even if it provides some benefit or clarity," and went on to state there are situations in which a broad "environmental effects" trigger is inappropriate for bringing about Section 404 regulation. The commenter also asserted an environmental effects

rationale was, found to exceed the Corps authority when the court invalidated "the Tulloch Rule regulating all excavation activities, including those that were merely removal activities with only incidental fallback."

We believe that a single and consistent definition of the term "fill material" is necessary to provide consistency and certainty in implementation of the CWA. Use of separate approaches to define that term under sections 404 and 402 result in uncertainties and potential regulatory gaps in which material does not clearly fall within one program or the other. Matters related to the "Tulloch Rule" (which defines the term "discharge of dredged material" and "incidental fallback") are fully discussed in that rule's preamble (66 FR 4550) and are outside the scope of this rule. Moreover, today's rule does not use an effects-based test to determine if a discharge occurs, but rather to determine when a given discharge falls into the category of "fill material" subject to section 404. We also note that unlike the Tulloch Rule, which implicates questions of when an addition of a pollutant occurs in the context of dredging and excavation activities, the effects-based test adopted in today's definition of "fill material" addresses additions of material to waters of the U.S. to such a degree and amount that it creates dry land or raises the bottom elevation.

Another commenter suggested eliminating the primary purpose test will increase Corps workload. They were concerned the proposed change would elicit an expansion of the Corps' "jurisdiction on certain kinds of fill material...and would slow the permit approval process further." We expect that because today's rule is generally consistent with existing practice it will not have substantial effects

on Corps workload or engender permit delays. In addition, unlike the proposal, today's final rule is more limited in scope as it contains an express exclusion from the definition of fill for trash and garbage.

Another commenter expressed concern that elimination of the "primary purpose" test in favor of an effects-based definition of fill would cause circumvention of the CWA by allowing polluters to "pass off waste material as fill," particularly with regard to coal mining activities. We do not agree that today's rule would "cause circumvention of the Clean Water Act." The Act itself does not define or dictate what constitutes "fill material," leaving it to the discretion of the agencies to define that term. As explained in the proposed rule preamble (65 FR 21294 - 21295) and the preamble to the final rule, use of a primary purpose test and differing Corps and EPA definitions of fill material has resulted in regulatory uncertainties and confusion. Today's rule is intended to avoid such problems, and is well with the agencies' authority and discretion to adopt.

3. Eliminating Waste Exclusion

Regarding comments received concerning the proposed rule's elimination of the waste exclusion, the majority of commenters were opposed to omitting the current waste exclusion language from the proposed definition of fill material. One commenter stated, "elimination of the waste exclusion would give the Corps new authority to allow the disposal of refuse directly into the nation's waters, . . . and is an outrageous attempt to circumvent the letter and spirit of the Clean Water Act." Furthermore, prohibiting the disposal of waste "in the nation's waters under Section 404 is mandated by the letter, purpose, goals, and Congressional intent embodied in

the Clean Water Act." Another commenter noted elimination of the waste exclusion is contrary to the "fundamental goal of the Clean Water Act: to eliminate the discharge of pollutants into the waters of the United States in order to preserve the physical, chemical and biological integrity of the nation's waters.

We agree that the goals of the CWA include the elimination of the discharge of pollutants, but do not agree that today's rule is inconsistent with those goals or with any actual requirements of the Act. First, today's rule does not authorize or permit the discharge of solid waste to waters of the U.S. As provided for by section 301 of the CWA, discharges to waters of the U.S. continue to be prohibited unless a permit under the Act authorizing the discharge is issued. Rather, the rulemaking being undertaken clarifies which permitting regime (section 404 or section 402) would be applicable. Moreover, as explained in the preamble to the proposed rule (65 FR 21293 - 21294), the section 404 program is specifically designed to regulate material that fills waters of the U.S. or changes their bottom elevation, and the 404(b)(1) Guidelines provide for the evaluation of alternatives to avoid or minimize the discharge of fill material. We also note, that in response to comments received, today's final rule modifies the proposal so as to exclude from the definition of fill material trash or garbage.

Several commenters suggest that the proposed elimination of the waste exclusion serves to "endorse the practice of mountaintop removal mining." Another expressed concern that removal of the "prohibition on use of fill that is discharged primarily to dispose of waste" would "greatly increase the uni-

verse of Section 404 regulated activities involving waste disposal."

Section 404 regulates the discharge of dredged or fill material to waters of the U.S., whereas the primary statute governing mountaintop removal mining is the Surface Mining Control and Reclamation Act (SMCRA). Rather than somehow "endorsing" that practice, today's rule ensures regulatory clarity and consistency by clarifying which CWA regulatory regime governs discharges of material that has the effect of fill, and does so in a way that is consistent with EPA's long-standing definition. While today's rule clarifies that mining related discharges with the effect of fill, such as overburden, are subject to section 404, no such discharge may actually take place except as authorized by a 404 permit. In addition, mountaintop mining activities are also subject to SMCRA permitting requirements before they may occur. We also do not believe today's rule will greatly increase the universe of waste disposal activities regulated by section 404 as today's rule is generally consistent with existing practice as well as reflecting the effects-based approach in EPA's long-standing definition. Finally, as noted above, today's final rule does specifically exclude from the definition of fill material trash, garbage or similar materials unless such materials are to be used to create a structure or infrastructure in waters of the U.S.

Another commenter was supportive of the clarification made by the Corps and EPA. Specifically, the commenter noted that, to the mining industry, the term "waste" refers to leftover rock and dirt that is impacted by coal mining activities, and should be regulated under section 404 of the CWA. As stated previously, we believe that in determining whether a

discharge is subject to section 404 or section 402, it is important to provide for application of the regulatory regime best suited to control the potential impacts. These materials both have the effect of-fill and are geological materials similar to many other types of fill material; we thus agree it is appropriate that they be regulated under section 404.

C. Legality of Proposal

1. Consistency with CWA and Regulatory Framework

A number of comments addressed issues about the consistency of the proposal with the CWA, generally, and with the cases and regulatory requirements implementing the Act. Those opposing the proposal argued that it reflected a "major weakening of current law" and undermined the zero discharge goal of the Act. The opponents of the rule noted that the CWA was established to protect the physical, chemical, and biological integrity of the nation's waters from pollution emanating from point as well as nonpoint sources. Instead, says one comment, the proposal cripples the effectiveness of the Act. An industry opponent of the rule argued that the rule goes well beyond the Corps' jurisdiction over protecting wetlands and other rare and important waters, and now has the Corps asserting jurisdiction over vast areas of desert that have no connection to the Corps mandate. Those supporting the rule argued that the proposal is consistent with the CWA purposes and the regulatory framework for the Act. A supporter noted that it is clear that Congress did not intend to stop mining in this country when the CWA was enacted, which the comment says would be the outgrowth of some of the arguments alleging that the proposal violates the CWA.

The agencies do not agree that the proposal would have resulted in a major weakening of the CWA. In fact, as noted above, the purpose of this regulatory change is to improve the effectiveness of the program by increasing the clarity and consistency of program implementation with the CWA. Today's final rule improves upon the proposal by specifically excluding trash or garbage from the definition of "fill material" and thereby ensuring that the public understands that such materials will generally not be permitted for disposal in waters. It is important to note that neither the proposal nor this final rule affects the scope of geographic jurisdiction. Thus, those comments concerning the scope of geographic jurisdiction are not germane to today's action.

Below we will address some the specific comments concerning the legality of the proposal and this final rule in light of existing regulations and case law.

a. *Section 402 versus section 404.* Numerous commenters noted that, although they agreed with the intent of subsection (e)(2) of the proposed rule (i.e., discharges covered by effluent limitation guidelines and discharges covered by a section 402 NPDES permit do not require a section 404 permit), the proposed language specifically excluding discharges subject to proposed or final effluent limitations guidelines or NPDES permits was ambiguous and confusing. One commenter, representing the mining industry, specifically was concerned that the exclusion, as worded, could inadvertently result in attempts by regulators in the field to have discharges excluded from section 404 coverage simply due to the presence of constituents in the material

for which effluent limitation guidelines exist and would apply if such constituents were discharged in wastewater (e.g., mine drainage or process waste water). Overall, commenters requested clarification of the (e)(2) language, even if such clarification was made in the Preamble to the rule.

Based on the comments received, the agencies recognize the potential for the proposed language to cause confusion and believe such language is unnecessary for achieving the purposes of the rule. Accordingly, today's final rule deletes the exclusion for discharges covered by effluent limitation guidelines and standards or NPDES permits. The agencies, however, will continue to be guided by practices and past determinations about the applicability of effluent limitation guidelines or NPDES permits in deciding whether section 402 or 404 will govern specific discharges. If EPA has previously determined that a discharge is covered by an ELG, that determination is not altered by today's rule. Similarly, even though some discharges covered by section 402, such as suspended or setteable solids can have the effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view.

Some commenters noted that section 404 is better suited to address certain types of discharges because it deals with physically modifying or replacing waters, whereas 402 deals with the discharge of waterborne pollutants and the ability of the receiving waters to assimilate them. Others, however, maintained that, rather than justifying regulation under section 404, the inability of certain discharges to

comply with section 402 requirements simply demonstrates that the CWA was intended to prohibit such discharges. Such comments also questioned the adequacy of Section 404 regulation of waste-type fills, due to inconsistent application of its alternatives analysis and compensatory mitigation requirements. The commenters asserted that the proposed rule constitutes a "dramatic reversal of agency policy" that was not justified simply to eliminate inconsistencies between the Corps and EPA definitions.

Clearly, two regulatory programs were established by the CWA serving distinct objectives and goals. One limits discharges of pollutants in order to protect water quality of the receiving water (section 402 NPDES program). The other regulates dredged and fill activities that, among other things, may displace or change the elevation of receiving water — often replacing it with dry land (section 404). Even though there are some water quality considerations included in the section 404(b)(1) guidelines, this is distinct from the water quality considerations and analysis of the assimilative capacity of receiving waters done as part of the section 402 review. In determining whether the section 402 versus section 404 permit will control specific discharges, the differing purposes of the two programs is an important consideration. Finally, as explained elsewhere and in the Federal Register notice of the final rule, today's rule reflects the approach in EPA's longstanding regulation and is generally consistent with past practice, so does not represent a radical departure for the agencies.

Some commenters also noted that the proposed rule language and preamble discussion created some

confusion about whether mine overburden and mine tailings are both subject to section 404 regulation as opposed to section 402. Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. Nevertheless, if EPA has previously determined that certain materials are subject to an ELG under specific circumstances, then that determination remains valid. Moreover, NPDES permits issued pursuant to section 402 are intended to regulate process water and provide effluent limits that are protective of receiving water quality. This distinction provides the framework for today's rule.

b. *Operation of Water Quality Standards, anti-degradation policies and 404(b)(1) Guidelines.* Two comments raised issues concerning compliance of the proposal with water quality standards and the section 404(b)(1) Guidelines, each arguing opposing conclusions. One comment noted that the Guidelines prohibited discharges that would cause or contribute to violations of water quality standards or that caused or contributed to significant degradation of the waters. This comment noted that while some provisions of the Guidelines contemplated a balancing approach, the above referenced provisions did not. They simply prohibited such actions. Moreover, the comment argued that compliance with both prohibitions was required. In addition, the comment concluded that "filling in waters for the purpose of waste disposal undeniably violates water quality standards and anti-degradation regulations," and as such, is prohibited by the section 404(b)(1) Guidelines. The second comment cited to EPA's Water Quality Standards Handbook and, specifically, to the

discussion of the Anti-degradation policy to reject the concept that "the anti-degradation policy necessarily prohibits filling operations by virtue of altering the use of the stream segment filled." This comment noted that the Handbook observes that compliance with the CWA anti-degradation policy is achieved through the application of the 404(b)(1) Guidelines, and further that any other construction of the anti-degradation policy would effectively eviscerate section 404 of the CWA. This comment also takes exception to the notion that all use of streams for waste assimilation is prohibited. Instead this comment claimed that the prohibition is against the use of streams as open sewers to the exclusion of other beneficial uses. The comment argued that theses issues are likewise resolved by the application of the 404(b)(1) Guidelines.

One commenter stated that the proposed rule will violate the CWA anti-degradation policy and state water quality standards by allowing discharges that destroy existing uses of water bodies or that fail to comply with water quality standards. Another commenter stated that the anti-degradation policy prohibits filling operations, generally; while other commenters noted that such an interpretation would be inconsistent with the intent of the CWA which expressly contemplates filling activities under section 404. Moreover, many commenters stated that any discharge of fill material in waters of the U.S. for purposes of waste disposal is prohibited by the CWA. In addition, some commenters added that such waste material discharges conflict with Federal and State water quality standards which prohibit the use waters of the U.S. for waste assimilation purposes (40 CFR 131.10(a)). Finally, one commenter noted that the current Corps definition of fill material ex-

cludes waste material and thus is regulated under section 402 of the CWA which would prohibit such a discharge.

Questions of whether water quality standards have been violated or the significant degradation standard has been surpassed are decided on a case specific basis, and not simply on the basis of whether the definition of fill material has been met. The assessment of the impacts in a specific case is critical. We do not agree with the broad statements that this rule violates the CWA anti-degradation policies or water quality standards. First, this rule defines a jurisdictional term that simply determines whether a permit under section 402 or 404 must be obtained for a discharge into waters of the U.S.; it does not authorize any specific activities. The issue of whether the anti-degradation policy or water quality standards will be violated in a specific case will have to be determined on the facts. Thus, we do not believe there is any basis to conclude that simply defining certain waste materials as 'fill material' is prohibited under the CWA as a matter of law.

Moreover, while these commenters suggest that the only filling prohibited by the Act is for purposes of waste disposal, in fact, their reading of the anti-degradation policy would effectively prohibit the discharge of any fill material in waters of the U.S. for any purpose, as several other comments noted. The commenters assert that, because the act of filling a water eliminates a portion of waters, it fails to comply with the requirement of EPA's anti-degradation policy to maintain and protect existing uses. If this were a correct reading of EPA's regulation and the Act, all fills in waters of the U.S. would be prohibited, because filling a water has the same effect of

eliminating some portion of it regardless of whether the purpose is waste disposal or some other purpose. As indicated in several of the comments, this result, however, would effectively eliminate section 404 from the statute. We believe that, by establishing a program under section 404 for authorizing discharges of fill material into waters of the U.S., Congress sanctioned the filling or elimination of waters where it can be done in an environmentally acceptable manner, i.e., where consistent with the 404(b)(1) Guidelines. Therefore, we do not believe that these commenters' reading of the statute can be squared with section 404 itself.

In contrast to commenters' strained reading, EPA's longstanding interpretation of the Act and EPA's regulations is consistent with Congressional intent. In 1985, EPA articulated its view that the anti-degradation policy is satisfied in the context of discharges subject to section 404 where a discharge complies with the requirement in the section 404(b)(1) guidelines that it not result in significant degradation of waters of the U.S. ***See Questions and Answers on Antidegradation* (1985); Water Quality Standards Handbook: Second Edition, August 1994. (While the guidance refers specifically to wetlands, its reasoning applies equally to discharges of fill material in any water of the U.S.).** This interpretation does not, like the commenters', effectively read section 404 out of the Act as it relates to fill material. This reading also reasonably squares EPA's anti-degradation policy with the specific environmental criteria applicable to discharges of dredged or fill material that Congress directed to be followed in section 404.

We also believe that commenters are incorrect that defining fill material to include certain waste material somehow violates EPA's water quality standards regulations related to designation of uses by states under section 303(c) of the Act. 40 C.F.R. 131.10(a) states: "In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the U.S." This regulation is consistent with section 303(c)(2)(A) of the Act, in which Congress directed states to designate appropriate uses of their waters, "taking into account their use and value for public water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes, and also taking into consideration their use and value for navigation." EPA promulgated the language cited above because it believed that Congress intended that states designate uses under section 303(c) to ensure the protection of their beneficial uses, including those listed in section 303(c). Once a state designates a use for a water, the state is also required to adopt numeric or narrative criteria to ensure the protection of those uses. EPA prohibited designating waters for waste assimilation or transport because of concern that such designation would be incompatible with the beneficial uses that Congress sought to encourage states to protect through their water quality standards.

Nothing in EPA's regulation, however, has any bearing on whether a particular discharge is classified as fill material subject to section 404 of the Act, or another pollutant subject to section 402. Instead, EPA's regulation only limits *states'* discretion in adopting designated uses *pursuant to section 303(c)*, which are submitted to EPA for approval under that provision. If a state were to adopt waste transport or

assimilation as a designated use, then, under EPA's regulation, EPA would be required to disapprove that designated use and, if the State failed to adopt an appropriate use, promulgate an appropriate federal use designation.

Commenters' reading of section 131.10(a) takes the provision entirely out of context, for they appear to read it to mean that no discharges may be authorized that would effectively allow transport or assimilation of wastes in waters of the U.S. That was never EPA's intent in adopting 131.10(a), nor could it have been. For example, under section 402 of the Act, EPA and authorized states issue permits for discharges of pollutants into waters of the U.S., in many or most cases for discharges of waste. The permitting authority evaluates, among other things, the effect of the "transportation" and "assimilation" of those wastes on the receiving water, and whether the discharge would comply with designated uses and applicable water quality criteria. Merely because waste is being transported or assimilated into the water does not, however, mean that the discharge violates 131.10(a). If it did, no pollutants could be discharged under the Act at all, a result contradicted by the existence of the Act's permitting schemes. Similarly, under section 404, discharges of waste material such as dredged spoil may be authorized even though the material is being assimilated into a water. Again, the permitting authority evaluates whether the waste discharge complies with water quality standards, but the mere fact that waste is being transported and assimilated into the water does not implicate 131.10(a).

Commenters may believe, in part relying upon the decision in *Bragg v. Robertson*, 72 F. Supp. 2d

642 (S.D. W. Va. 1999), *rev'd*, 248 F. 3d 275 (4th Cir. 2001), that fill material is different in that it may, in certain circumstances, bury portions of streams, in which case the waste material may be so large that it occupies or "assimilates" the entire portion of the stream. Again, EPA's water quality standards regulation merely limits states' discretion in designating uses under section 303, and EPA never intended that this provision directly apply to limit the authority of EPA, the Corps or states in making permitting decisions under sections 402 or 404 of the Act. Even if that provision were somehow directly relevant to the permitting context, commenters' reading cannot be squared with section 404 itself which, as discussed above, expressly contemplates that parties may receive authorization to "fill" waters of the U.S. subject to the Act's environmental safeguards. Fills by definition occupy a portion of a water of the U.S., and in many cases convert the water to dry land. Obviously, where that occurs, a designated use may no longer be met in that portion of the water body. Again, if the commenters' reading of 131.10(a) were adopted, no fills could be authorized in waters of the U.S., a result directly contradicted by the existence of the section 404 permitting program for fill material. As for the concern of some commenters that some fills, such as certain valley fills, are so large that they would eliminate entire portions of streams, that does not change the inapplicability of section 131.10(a) to the permitting process, or the implication of the commenters' reading for undermining the existence of the 404 permitting program. The size of the valley fill is, however, very relevant to the section 404 permitting process in determining whether a particular discharge may be allowed, for the permitting authority must determine that the discharage would not

cause significant degradation of waters of the U.S., and that all appropriate and practicable steps have been taken to avoid, minimize and compensate for the effects of the discharge.

The final rule recognizes that the term "fill material" does not include trash or garbage. If a party discharges material into waters of the U.S. that does not meet the final definition of "fill material," this is a prohibited discharge under CWA section 301 except in accordance with a permit issued under the NPDES program. Several commenters correctly noted that because discharges of this nature would not generally meet state water quality standards designed to protect and maintain the integrity of the nation's waters, the discharge is unlikely to be permitted by the section 402 program.

One commenter noted that currently, the Corps and EPA provide different definitions of the term "fill material." This an appropriate reading of current Corps regulations and illustrates why the Corps and EPA are issuing this rule today. The confusion caused by the differing regulatory definitions needed to be resolved. By establishing a single definition of "fill material," today's rule will ensure proper, consistent and more effective regulation under the CWA and reduce the uncertainty within the regulated community of whether section 404 or section 402 requirements apply to their proposed operations.

2. Consistency with the *Bragg* decision and effect on litigation

Several commenters argued that EPA and the Corps should not be trying to "circumvent" the decision by the District Court in *Bragg v. Robertson*, which stated that coal mine overburden is waste material that, under Corps regulations, is subject to

regulation under section 402 of the CWA, not section 404. One commenter also contended that we should not finalize a rule while the appeal of the *Bragg* decision before the 4th Circuit is pending. Two commenters asserted that the *Bragg* court ruled that the Corps did not have jurisdiction over the discharge of mining waste into waters of the U.S., and several argued that the *Bragg* ruling found such fills to be in violation of the CWA.

This final rule is not designed to circumvent any judicial decisions. Rather, as explained in the proposal, several recent court decisions have concluded that, that despite EPA's longstanding definition of fill material and the Corps' longstanding regulatory practice, regulating certain discharges under section 404 of the CWA was inconsistent with the definition of fill in the Corps' regulations. We believe these decisions reflect the uncertainty caused by differing regulatory definitions of fill material, which we are resolving today. Rather than "circumventing" those decisions, today's rule will ensure that, in the future, the courts have clear regulatory guidance as to how fill material is regulated under the CWA.

Moreover, while those judicial decisions turned on the Corps' regulatory definition of "fill material," they did not address the scope of our authority to revise our regulations in a reasonable manner consistent with statutory mandates. Therefore, while today's rule clarifies the definition of fill material in response to these courts' interpretation of our prior regulations, those decisions do not constrain our authority to adopt today's rule.

As for the status of the *Bragg* case, the Fourth Circuit Court of Appeals has reversed the decision of the District Court and held the claims remaining in

that case were barred by the 11th amendment of the U.S. Constitution. Therefore, the opinion of the District Court, including dicta addressing the definition of fill material under the CWA, has been vacated. On January 23, 2002, the U.S. Supreme Court denied the plaintiffs' petition for Certiorai . In any case, the Fourth Circuit noted that its decision did not affect the District Court's approval of the settlement of the claims in the case against the Federal defendants which, consistent with today's rule, provided for the regulation of coal mine overburden under section 404 of the CWA.

Some commenters reacted to our discussion in the preamble of the proposed rule of the settlement of the *Bragg* litigation, and our discussion of the steps that federal agencies are taking to ensure that adequate environmental controls are placed on valley fills resulting from coal mining operations in West Virginia. The comments included one voicing concern that the proposed rule provided no confirmation that, subsequent to the *Bragg* MOU, the Corps would provide more extensive review of proposed valley fills. Our intent in describing that effort was to highlight that modifying the definitions of fill material in the manner we proposed was consistent with our current practice of regulating valley fills pursuant to section 404 of the CWA. We discussed our current activities regarding coal mine disposal practices in Appalachia to provide background for the public on those activities. However, the manner in which we regulate such fills, as well as any other particular fill activity, is not within the scope of this rulemaking, as the sole issue here is how fill material is defined. The environmental controls placed on any particular activity will be addressed through the section 404 permitting process, not any elements of today's rule.

To the extent commenters are contending that the manner in which we have regulated valley fills demonstrates that such fills should not be regulated under section 404, we disagree. For all the reasons we have stated, we believe that the appropriate test for whether a pollutant is regulated under section 404 as "fill" is whether it has the effect of fill (regardless of its purpose), because under those circumstances the section 404 program is particularly well suited to address the environmental impacts of the discharge.

3. Consistency with the case of *Resources Investment Inc. v Corps*

One commenter characterized the proposed rule as alleviating the jurisdictional uncertainties that arise from the "primary purpose" test, and in the commenter's opinion, were the basis for the Ninth Circuit Court of Appeals' decision in *Resource Investments Incorporated v. U.S. Army Corps of Engineers* (*RII*), 151 F.3d 1162 (9th Cir. 1998). Other commenters, however, contend that the government's application of the *RII* decision in its stated rationale for the proposal ignores an additional holding in *RII*. 151 F.3d 1162 (9th Cir. 1998). Commenters characterized the proposed rule as an attempt to "override" or "overrule" the Ninth Circuit's binding decision upon the government and asserted that any effort to change the result in *RII*, by redefining "fill material," would be improper. Moreover, commenters asserted that to issue the rule, as proposed, would be inconsistent with the concept that federal agencies are required to apply federal law as interpreted by the federal courts in the relevant Circuit. They then argued that the narrow scope of the *RII* decision does not support the government's concerns that an "un-

reasonable end result" may occur should the definition of "fill material" be left as it is. In addition, commenters asserted that to revise the definition of "fill material," as proposed, would be duplicative, as applied to solid waste landfills. One commenter framed this argument as having "profound federalism implications," asserting that, under the revised definition of fill material, both state RCRA-approved programs and Federal 404 authority to permit landfill activities will apply, creating a situation where potentially inconsistent wetland-impact determinations could result. This too, commenters indicated, is inconsistent with the holding in *RII*. Commenters also suggested that the proposed rule is an improper means of resolving disagreements between the federal agencies and the courts.

In the Preamble to the final rule, the agencies addressed *RII* decision in detail, including responses to these comments. That discussion is set forth below.

In *Resource Investments Inc v. Corps*, 151 F.3d 1162 (9th Cir. 1998), the Ninth Circuit held that the Corps lacked the authority to regulate a solid waste landfill in waters of the U.S. The court found that: (1) neither the solid waste itself nor the liner consisting of layers of gravel and low-permeability soil constituted "fill material" under Corps regulations; and (2) because of the potential for inconsistent results if landfills were regulated under both section 404 of the CWA and Subtitle D of RCRA, requiring these facilities to be subject solely to RCRA would "harmonize" the statutes.

We discussed this decision in the preamble to the proposed rule as an example of some of the confusion engendered by the "primary purpose" test. The court

found in *RII* that the liner was not fill material because its primary purpose was not to replace an aquatic area with dry land or change the bottom elevation of a waterbody, "but rather to serve as a leak detection and collection system." 151 F.3d at 1168. We explained in the proposal that fills typically serve some other purpose than just creating dry land or raising a water's bottom elevation and that, if the court's reasoning were taken to its logical conclusion, many traditional fills in waters of the U.S. would not be subject to section 404.

Some commenters objected to our proposal not to follow the decision in *RII* in this rulemaking. They criticized the proposal as an improper attempt to "override" or "overrule" the Ninth Circuit's decision, particularly within the Ninth Circuit where the decision is binding. They also argued that the proposed rule failed to address the potential for duplication and inconsistency in decision-making by State and Federal agencies identified in *RII*.

In our view, these comments raise two distinct issues. The first is whether we should follow the *RII* decision outside the Ninth Circuit and cease regulating discharges associated with the construction of solid waste landfills under section 404. The second issue is whether *RII* precludes us from regulating discharges associated with construction of solid waste landfill structures within the Ninth Circuit, even after today's rule. We address each of these issues in turn.

Regarding the first question, we note first that, after *RII* was decided, we chose not to acquiesce in the decision outside the Ninth Circuit. While we agreed that the solid waste disposal placed in a landfill is not fill material (and such waste continues to

be excluded under today's rule), we believed that the court misapplied the primary purpose test in the Corps' regulations, and that the court's conclusion that RCRA supplanted CWA regulation was contrary to Congressional intent. See *Resource Investments Inc. et al. v. Corps*, No. 97-35934 (Government's Petition for Rehearing and Suggestion for Rehearing En Banc, September 30, 1998). Thus, after the court decided RII, the Corps has continued to issue section 404 permits for the construction of solid waste landfill infrastructures outside the Ninth Circuit.

After considering public comments, we continue to decline to follow the *RII* outside the Ninth Circuit and have, therefore, maintained the approach in the proposed rule to the regulation of solid waste landfills. The revisions to the Corps' definition of fill material in today's rule address the basis for the court's holding that the landfill did not involve the discharge of fill material under section 404. For the reasons explained elsewhere in today's notice, we believe that an effects-based test is the appropriate means of evaluating whether a pollutant is "fill material" and should be regulated under section 404 as opposed to section 402 of the CWA. The placement of berms, liners and other infrastructure (such as roads) associated with construction of a solid waste landfill in waters of the U.S. has the effect of replacing water with dry land or raising the bottom elevation of a water. Therefore, under today's rule, they constitute fill material. Such discharges are indistinguishable from similar discharges associated with other construction activity, which the Corps has always regulated as fill under section 404. *See* 40 CFR 232.2; 33 CFR 323.2 (defining "discharge of fill material," to include "fill that is necessary for the construction of any structure in a water of the U.S.;

the building of any structure or impoundment requiring rock, sand, dirt or other material for its construction; site-development fills for recreational, industrial, commercial, residential and other uses; causeways or road fills; . . ."). We have amended our definition of this term to include the "placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills." That amendment does not change substantively the prior definition, but merely adds solid waste landfills as an example to make clear that it constitutes a "discharge of fill material." Thus, under our new regulations, discharges associated with the creation of solid waste landfill structures clearly constitute "fill material."

To the extent some commenters asserted that revising our regulation was an improper attempt to "overrule" or "override" this holding in *RII*, we disagree. The court's analysis of the "fill material" in *RII* was based entirely on the Corps regulations as they existed at that time, and not upon the interpretation of the CWA itself. Moreover, the CWA does not define "fill material." Therefore, both the statute and the Ninth Circuit's decision leave us the discretion to adopt a reasonable definition consistent with the statutory scheme. We have explained elsewhere why we believe today's definition of fill is reasonable and appropriate under the CWA. To the extent today's rule has the practical effect of "overriding" this aspect of the court's decision in *RII*, that is neither remarkable nor inappropriate, since it is entirely proper for agencies to consider and, if appropriate, revise their regulations in light of judicial interpretation of them.

For purposes of deciding whether to apply the *RII* decision outside the Ninth Circuit, we have also evaluated the second basis for the court's decision — that regulation solely under Subtitle D of RCRA instead of section 404 would "harmonize" the statutes and avoid necessary duplication. We decline to follow that holding both on legal and policy grounds. First, we believe, notwithstanding *RII*, that eliminating the CWA permitting requirement on the grounds that an activity is regulated under RCRA is contrary to Congressional intent in both statutes. Second, we do not agree with the court that regulation under Subtitle D and section 404 would constitute unnecessary duplication, in light of the distinct purposes served by these authorities, the differing Federal roles under the two statutes, and our clarification in today's rulemaking of our intent to give all appropriate deference to State RCRA decision-making in the section 404 permitting process.

We first do not agree with the court's legal reasons for concluding that regulation under Subtitle D of RCRA supplants CWA regulation. The CWA prohibits the discharge of any pollutant into waters of the U.S. without a permit under the Act. *See* CWA section 301(a). Even though an activity associated with a discharge may be regulated under other Federal or State authorities, we believe there is not any basis to conclude that such regulation by itself makes section 301(a) of the Act inapplicable to a discharge of a pollutant into waters of the U.S. In effect, the court concluded that enactment of a regulatory scheme under Subtitle D of RCRA impliedly repealed the statutory permit requirement under the CWA. But "the intention of the legislature to repeal must be clear and manifest." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976), and the court must

conclude that the two acts are in irreconcilable conflict or that the later act covers the whole subject of the earlier one and is clearly intended as a substitute. *Id.* The court in *RII* did not, and could not, make these findings.

In fact, Congress itself made precisely the opposite findings when it enacted RCRA. Section 1006(a) states:

> Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the [CWA] except to the extent such application (or regulation) is not inconsistent with the requirements of [the CWA].

This provision precludes regulation of solid waste landfills under Subtitle D in a manner inconsistent with the requirements of the CWA. In our view, it is plainly "inconsistent" with the requirements of the CWA to hold that regulation under RCRA eliminates CWA permitting requirement altogether.

Instead, the court relied upon certain Corps regulations, statements by Corps officials and a 1986 interagency MOA. The court first stated that applying section 404 to solid waste landfills was "unreasonable because there would be "potentially inconsistent results" where both the State and the Corps were applying the same criteria in regulating solid waste landfills. 151 F.3d at 1169. The court held that this "regulatory overlap is inconsistent with Corps regulations stating that 'the Corps believes that state and federal regulatory programs should complement rather than duplicate one another.'" 33 CFR 320.1(a)(5). In addition, the court

cited statements by the Corps in a 1984 letter to EPA stating that EPA was in a better position than the Corps to regulate solid waste landfills. Finally, the court cited the 1986 MOA between the Corps and EPA.

However, none of these "authorities" purport to modify the statutory permitting requirements of the CWA, nor could they. The Corps' regulation cited by the court is simply a statement of the Corps' policy objective of working in concert with State regulatory programs, an important and continuing Corps objective that was discussed previously. The Corps' letter and the MOA reflected our efforts to manage our programs in light of our differing definitions of fill material, but did not speak to the CWA statutory permitting requirement. The court also misconstrued the 1986 MOA entered into by EPA and the Corps as indicating we intended to make the regulation of solid waste facilities within "the sole purview of the EPA and affected states" after EPA promulgated certain Subtitle D regulations. 151 F.3d at 1169. In fact, we stated,

> EPA and Army agree that consideration given to the control of discharges of solid waste both in waters of the United States and upland should take into account the results of studies being implemented under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA), signed into law on November 8, 1984. . . .
>
> Unless extended by mutual agreement, the agreement will expire at such time as EPA has accomplished specified

> steps in its implementation of RCRA, at which time the results of the study of the adequacy of the existing Subtitle D criteria and proposed revisions to the Subtitle D criteria for solid waste disposal facilities, including those that may receive hazardous household wastes and small quantity generator waste, will be known. In addition, data resulting from actions under the interim agreement can be considered at that time.

It should be noted that this MOA is about the regulation of solid waste disposal, not about the construction of infrastructure, including solid waste landfill infrastructure, that involves discharges of fill material to waters of the U.S. Further, we did not address in the MOA how solid waste landfills would be regulated after EPA completed its study and certain RCRA regulations, but said only that these developments would "be taken into account" as we decided how to address these discharges in the future. Thus, in addition to the inability of the agencies as a legal matter to modify the CWA statutory permitting requirement through an MOA, we expressly reserved any judgment about the appropriate regulatory approach to be taken after certain actions were taken under RCRA. Also, contrary to the court's conclusion, we have viewed the MOA as remaining in effect after EPA submitted its report to Congress and promulgated Subtitle D regulations in 1991. See Memorandum of John F. Studt, U.S. Army Corps of Engineers, May 17,1993 (stating "the subject MOA remains

effective in its entirety until further notice" and noting that this position was coordinated with EPA).

We conclude, therefore, that it would be contrary to the language and intent of both the CWA and RCRA to conclude that RCRA subtitle D supplants the CWA permitting requirement for discharges into waters of the United States associated with the construction of solid waste landfills. The different Federal roles in the permitting schemes in these statutes supports this conclusion. Subtitle D provides that each State will "adopt and implement a permit program or other system of prior approval and conditions" to assure that each solid waste management facility within the State "will comply" with criteria established by EPA for the siting, design, construction, operation and closure of solid waste landfills. RCRA section 4005(c)(1)(B). States are required to submit permit programs for EPA to review and EPA is required to "determine whether each State has developed an adequate program" to ensure compliance with EPA's Subtitle D regulations. RCRA section 4005(c)(1)(B) and [illegible]. However, RCRA does not grant to EPA authority to issue permits for solid waste landfills, review State permitting decisions or enforce Subtitle D requirements in States with approved programs. The court in *RII* appeared to misunderstand EPA's authorities under Subtitle D of RCRA when it stated that EPA would be the permitting authority in the absence of an approved State program. *See* 151 F.3d 1169 ("we hold that when a proposed project affecting a wetlands area is a solid waste landfill, the *EPA* (or the approved state program) ... will have the permit authority under RCRA.") (Emphasis added); 151 F.3d at 1167 ("RCRA gives the EPA authority to issue permits for the disposal of

solid waste, but allows states to substitute their own permit programs for the federal program if the state program is approved by EPA."). While this authority exists with regard to disposal of hazardous waste under Subtitle C of RCRA, EPA does not have this authority with regard to disposal of non-hazardous solid waste under Subtitle D.

In contrast, the CWA requires either a Federal permit for discharges of pollutants into waters of the U.S., or issuance of a permit by a State/Tribe with an approved program, subject to EPA's authority to object to a permit where EPA finds it fails to meet the Guidelines and requirements of the CWA. CWA sections 402(d); 404(j). EPA also has authority under the CWA to enforce conditions in Federal or State permits under the Act. CWA section 309.

These contrasting statutory schemes support the conclusion that eliminating CWA authority over discharges of fill material associated with construction of solid waste landfills would mean a significant departure from the statutory structure created by Congress in the CWA, a scheme which Congress expressly sought to preserve when it adopted RCRA. *See* RCRA section 1006(a). This does not mean that we view the Federal role as one of second-guessing every decision made by State regulatory authorities under RCRA. To the contrary, both RCRA and the CWA reflect a strong presumption in favor of State-administered regulatory programs. As discussed elsewhere, we intend to rely on State decision-making under RCRA to the extent allowed under current law and regulations. However, we believe that eliminating a Federal role entirely on these matters is neither appropriate nor consistent with Congressional intent under RCRA or the CWA.

Thus, we decline to follow the decision in *RII* outside the Ninth Circuit because we conclude there is not an adequate legal basis on which to conclude that discharges of pollutants associated with solid waste landfills no longer need to be authorized by a CWA permit solely because the project receives a permit under Subtitle D of RCRA.

We nonetheless share the basic policy perspective expressed by the court in *RII* about the need to avoid unnecessary duplication and potential inconsistent application of regulatory programs under the CWA and RCRA. In fact, RCRA expressly vests EPA with the responsibility to "integrate all provisions of [RCRA] for purposes of administration and enforcement and [to] avoid duplication, to the maximum extent practicable, with the appropriate provisions of the . . . [CWA]. . . . Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies of this chapter and the CWA. . . ." RCRA section 1006(b). EPA has sought such integration first by promulgating location restrictions for landfills that are consistent with the criteria for issuance of section 404 permits. See 40 CFR 258.12; 230.10. Among other requirements, a landfill may not be located in wetlands unless it is demonstrated to the State that there are not less environmentally damaging practicable alternatives, the facility will not cause significant degradation of wetlands, and that appropriate and practicable steps have been taken to mitigate the loss of wetlands from the facility. However, EPA never purported to substitute Subtitle D regulation for the CWA permitting requirement, a result that would violate both section 1006(a) and (b). Instead, the Subtitle D RCRA regulations make clear that owners or operators of municipal solid waste landfills "must comply

with any other applicable Federal rules, laws, regulations, or other requirements." 40 CFR .2583. At the time EPA promulgated this regulation, the agency expressly noted that such requirements include those arising under the CWA. See 56 FR 51042 (October 9, 1991).

We do not believe, however, that the Subtitle D and section 404 programs are redundant. Rather, each program has a distinct focus. The State RCRA permitting process addresses a much broader range of issues, including technical operating and design criteria, ground water monitoring, corrective action, closure and post-closure care and financial assurances. In contrast, the section 404 process is focused exclusively on the impacts of discharges of fill material on the aquatic ecosystem, and ways of ensuring that those impacts are avoided, minimized and compensated. Because of the Corps' expertise in protecting aquatic ecosystems, we have found that State RCRA permitting agencies often incorporate by reference the requirements of section 404 permits. (For example, the State RCRA permit for the *RII* landfill required the applicant to implement the wetlands and mitigation plan to be approved by the Corps through the 404 permit process.) We believe that, in these and other ways, State and federal permitting authorities can create efficiencies by relying on each other's expertise in making regulatory decisions.

We intend to make additional efforts to avoid unnecessary duplication in the Federal and State permitting process. As explained in section II.C of this final preamble, we intend that the Corps will rely on decisions by the State RCRA authority about the siting, design and construction of solid waste

landfills in waters of the U.S. to the extent allowed by law and regulations. Appropriate deference to State decision-making will help avoid duplication, while still ensuring that the Corps fulfills its responsibilities to authorize discharges of fill material associated with solid waste landfills in accordance with CWA requirements.

This does not mean that, in every single case, State and Federal decision-makers will agree on whether a particular project or configuration is environmentally acceptable. Nevertheless, instances of disagreement have been rare. We intend to further enhance our efforts to ensure effective coordination between state and federal officials. However, we do not agree with the court in *RII* that the only way to avoid unnecessary duplication is to eliminate the CWA permitting requirement altogether.

We next address commenters' assertions that the decision in *RII* continues to preclude us from regulating solid waste landfills under section 404 within the Ninth Circuit These comments also argue that, given the 'statutory' basis for the court's decision, we cannot change the result in the Ninth Circuit through this rulemaking.

As noted above, the court construed administrative materials of the Corps and EPA as supporting the conclusion that the agencies did not intend to regulate solid waste landfills under section 404 of the CWA. In light of this agency intent, the court concluded that subjecting landfills to regulation solely under RCRA would "harmonize" the statutes and "give effect to each [statute] while preserving their sense and purpose." 151 F.3d at 1169. The court found that this harmonization "is consistent with the sense of the CWA that discharges of solid waste ma-

terials are beyond the scope of section 404 . . . and avoids unnecessary duplication of federal and state efforts in the area of wetlands protection." *Id.*

We again emphasize the distinction between "discharges of solid waste material," as referenced by the court and discharges of fill material associated with the construction of infrastructure. In this rulemaking, we have clarified that discharges having the effect of raising the bottom elevation of a water or replacing water with dry land, including fill used to create landfills such as liners, berms and other infrastructure associated with solid waste landfills are discharges of fill material subject to the section 404 program. Therefore, we have altered the landscape as understood by the court in *RII* (i.e., that these facilities were entirely outside the intended purview of section 404). We do not agree with commenters who argued that there was a "statutory" basis to the court's decision in the sense that the holding of the decision turned on an interpretation of Congressional intent in the CWA or RCRA. The court did not cite any provision of the CWA or RCRA to support its conclusions. Rather, the court derived the "sense and purpose" of the CWA based on agency regulations, guidance and correspondence. By clarifying the scope of section 404 authorities in this rulemaking, we have altered the "sense and purpose" of the CWA underlying the court's conclusion that regulation solely under RCRA would "harmonize" the statutes. Because the premises before the court have changed, we do not view the court's decision as continuing to bar the regulation under section 404 of discharges associated with solid waste landfills within the Ninth Circuit. At a minimum, today's rule calls into question the continuing vitality of the court's reasoning and conclusions and, should a case be brought within

the Ninth Circuit challenging our authority to regulate solid waste landfills, we would ask the court to address the question anew in light of the clarification of our authorities in today's rule.

4. Consistency of Proposal with Past Policy, 1986 Solid Waste MOA, and Other Agency Documents

Some commenters questioned the adequacy of the agencies' basis for what they perceived as a change in policy. They viewed the elimination of the waste exclusion from the Corps' definition as representing an unexplained and drastic departure from existing regulations and agency policy. Other comments viewed the proposed rule as a drastic change in policy intended to avoid any more challenges to valley fills and coal mine waste disposal. They asserted that it was clear waste disposal is not allowable under the Corps' definition of fill material and that activities whose primary purpose is waste disposal are subject to Section 402, and not Section 404.

We do not agree that the proposal reflects a drastic change in policy. Rather, the rulemaking is intended to ensure a clear, effective, and consistent regulatory approach with regard to materials that have the effect of fill by providing a single consistent definition of the terms "fill material" and "discharge of fill material." The rule does this by embodying elements of both EPA's and the Corps' previous definition of fill material, while reconciling the differences between them. Commenters asserting a drastic policy shift point to the changes in the Corps' definition of fill material (33 CFR 323.2(e)(2001)). Today's rule (by use of an effects-based test to define fill material) reflects the existing approach already

used under EPA's definition (40 CFR 232.2 (2001)), which has been in place since 1977. Moreover, the issue being addressed is not solely what materials should be subject to Section 404 permitting authority, but also the appropriate scope of Section 402 permitting. EPA is the agency assigned responsibility for administering Section 402, and under the existing EPA definition, material that has the effect of fill, *regardless of the purpose of the discharge*, is deemed fill material, and as such is not regulated under the Section 402 program. See, 33 USC 1342(a)(1). As was explained in the proposed rule's preamble, the rulemaking is intended to reconcile the differing Corps *and* EPA definitions in a manner consistent with the statutory scheme (see 65 FR 21293-21294) and that resolves regulatory uncertainties resulting from the differing definitions (see 65 FR 21294- 21295).

Others expressed concern that the proposal would place the Corps, rather than EPA, in primary control of waste disposal in waters of the U.S., believing that the proposal would dramatically enlarge the range of Section 404 regulated activities involving waste disposal. They noted that the proposal not only would have eliminated the Corps' definition's "primary purpose" test (i.e., whether the material is used for the primary purpose of creating dry land or elevating the water body bottom), but also that definition's exclusion of pollutants primarily to dispose of waste.

Today's rule does not alter jurisdiction under the Section 402 program as it reflects an effects-based approach to defining fill material that is similar to that currently used by EPA. We thus do not agree it somehow alters responsibilities to make the Corps

the primary agency in charge of waste disposal under the CWA. We also note that modifications have been made to the proposal in response to comments received expressing concern over the proposal's elimination of the Corps definition's waste exclusion. In particular, today's rule has been modified to provide an explicit exclusion from the definition of "fill material" for trash, garbage or similar materials unless such materials are to be used to create a structure or infrastructure in waters of the U.S., such as a berm or artificial reef. That modification narrows the proposal's scope of what constitutes "fill material." Thus, even more so than the proposal, the rule adopted today does not reflect a policy change putting the Corps primarily in charge of waste disposal.

Another comment suggested inconsistency of the proposal with the statement in the proposed rule preamble that "waters of the U.S. should not be polluted by discharges of solid waste, which is generally not a suitable or appropriate form of 'fill material,' for a variety of reasons." (65 FR 1296). The commenter did note the preamble explained the proposed changes comport with existing practice, but asserted that existing practices violates the law. They claimed the rule was being changed to overturn part of the ruling in *Bragg* finding that issuance of 404 permits for the discharges at issue was illegal, in an attempt "to allow the destruction to continue."

We do not agree that the proposal or today's rule is inconsistent with the preamble statement. First, neither the proposal nor today's rule have the effect of authorizing or permitting the discharge of solid waste to waters of the U.S. As provided for by Section 301 of the CWA, discharges to waters of the U.S.

remain prohibited unless a permit under either Section 404 or 402 authorizing the discharge is issued. Rather, the rulemaking being undertaken clarifies what regulatory regime (Section 404 or 402) would be applicable. Moreover, as explained in the preamble to the proposed rule (65 FR 21293 - 21294), because the Section 404 program is specifically designed to regulate material that fills waters of the U.S. or changes their bottom elevation, whereas Section 402 is primarily designed to regulate sewage and industrial effluents, we believe Section 404 is the environmentally preferable permitting regime to apply. In response to comments received, we also have modified the proposal in today's final rule to exclude from the definition of fill material trash, garbage or similar materials unless such materials are to be used to create a structure or infrastructure in waters of the U.S.

With regard to assertions that existing practices do not comport with the law and that the rule is motivated by an intent to overturn the *Bragg* decision, we note the *Bragg* court actually approved a settlement agreement resolving claims against the Federal defendants, under which overburden from valley fills would continue to be subject to Section 404, and determined that settlement agreement "accords with the law." See 54 F. Supp 653, 665. A subsequent October 1999 Memorandum Opinion and Order in the *Bragg* case (addressing SMCRA claims against the State defendants) contained language that does question the applicability of Section 404 to mining overburden in light of the Corps' regulations' primary purpose test. However, as explained in the proposed rule's preamble (65 FR 21295), that language was obiter dicta rather than a holding of the Court. Moreover, on April 25, 2001, that October

1999 Memorandum Opinion and Order was **vacated** by the U.S. Circuit Court of Appeals for the Fourth Circuit, which determined the underlying claims against the State defendants were barred by the 11th Amendment of the U.S. Constitution. **248 F..3d 275 (4th Cir, 2001); that Fourth Circuit decision left intact the 1998 settlement agreement. See 248 F.3d at 288, n.1 (noting District Court's approval of the settlement agreement).** We thus do not agree that existing practices do not comport with the law. See also, *Avoyelles Sportsmens League v. Marsh*, 715 F. 2d. 897, 924-925 (5th Cir. 1983) (endorsing use of an effects-based test for determining what constitutes fill material subject to Section 404). Finally, with regard to assertions that the proposal was somehow motivated by a desire to "overturn the *Bragg* decision' we further note that the proposed rule preamble explained in detail the various regulatory uncertainties and confusion arising from the differing Corps and EPA definitions of fill material and the environmental, legal, and programmatic reasons why there was a need to reconcile those differences. 65 FR 21294 -21295.

Another commenter stated that the volume of a single stream fill can be as much as up to 250 million cubic yards with stream burials up to 2 miles long, and that from 1986 to 1998, at least 900 stream miles were filled with excess spoil and coal mining waste in Pennsylvania, Kentucky, West Virginia and Virginia. The commenter concluded from this that Section 404 permits are rarely denied and the 404(b)(1) protections that the proposed rule preamble refers to as sufficiently protective of the aquatic environment are not if a standard that allows no "significant effect" allows the complete burial of miles of streams. This commenter also noted that the

proposal would have added "placement of coal mining overburden" to the definition of "discharge of fill material," and indicated this was contrary to *West Virginia Coal Assn. v. Reilly*, 728 F. Supp. 1276, 1281 (S.D.W.Va. 1989), and that the agencies had not clarified why amending the regulatory definitions makes more sense than refining the MOA's list of mining wastes already disposed of under Section 402, pursuant to EPA regulation. Another commenter also pointed to the definition of "discharge of fill material" in 33 CFR 323.2(f), noting that the examples listed in that definition are all constructive and do not include waste disposal.

While we agree that the length of streams filled by valley fills can be substantial, we do not agree that this leads to a conclusion that such fills or other such wastes would be better regulated under Section 402 rather than 404. With regard to *West Virginia Coal Assn*, that decision involved issues arising under the regulations existing at the time of the decision (i.e., with the differing Corps and EPA definitions)and the 1986 MOA that was based on those regulations; it neither held or suggested that the regulations could not be changed or clarified so as to reconcile those differences. With regard to suggestions of further refining the MOA as to regulation of mining waste under Section 402 or application of Section 402 in lieu of Section 404, we note that Section 404 is better designed to address impacts associated with filling of waters of the U.S., as it provides for evaluation of impacts on aquatic ecosystems, consideration of practicable alternatives to avoid impacts, consideration of measures to minimize impacts, and mitigation of unavoidable impacts. In contrast, Section 402 primarily relies on use of end of pipe technology and water quality based stan-

dards. These considerations were explained in detail in the proposed rule preamble (65 FR 21293 -21294), and we believe amply support a conclusion that application of Section 404 to regulate materials with the effect of fill is reasonable and environmentally protective.

We do believe that the agencies should continue to look for improvement in Section 404 program implementation related to valley fills and have undertaken a number of measures to that end. These include an April 1999 Memorandum of Understanding between the Office of Surface Mining, the Fish and Wildlife Service, EPA, the Corps, and the State of West Virginia that describes discharges that the signatory agencies believe generally should have only a minimal effect on waters of the U.S., development of technical models to help minimize the size of proposed coal overburden discharges, and initiation of development of a comprehensive EIS to assess current federal and state authorities for regulating coal mining discharges in Appalachia and what measures may be necessary to ensure protection of human health and the environment. A draft of that EIS is anticipated to be available for public comment on August 2002. In addition, Nationwide Permit 21 was revised and reissued on January 15, 2002, with improvements to its mitigation provisions and a requirement not only for pre-construction notification to the Corps but also written authorization from the Corps before the project can proceed. See discussion of Nationwide Permit 21 at 67 FR 2038- 2043.

Another comment took issue with the proposal's preamble language (65 FR 21294) that explained it was problematic for the Corps to make subjective determinations about the primary purpose of a

prospective discharge. The comment suggested this difficulty would be eliminated if the regulations made it clear that the Corps and EPA (and not the project applicant) are to make an independent determination.

We do not agree that the difficulties described in the preamble can be resolved by simply having us make an independent determination of the primary purpose of a prospective discharge. First, we believe it preferable to apply the regulatory regime that is best fitted to address the *effects* of the particular discharge, rather than assigning regulatory responsibility on the basis of project purpose. For discharges with the effect of fill, as explained above, we believe the appropriate regulatory regime is Section 404. Moreover, an independent determination by the agencies would not resolve difficulties arising under the primary purpose test. For example, in *RII* (discussed in the proposal's preamble at 65 FR 21294), the Corps determined that a discharge of fill material was involved, as the primary purpose of the discharge associated with construction of the landfill was to replace waters of the U.S. with dry land or alter the bottom elevation. The Court however interpreted the primary purpose test on its own to come to a different conclusion, finding the liner was not fill material because its primary purpose was not to replace an aquatic area with dry land or change the bottom elevation of a waterbody, "but rather to serve as a leak detection and collection system." 151 F.3d at 1168.

A number of comments were received questioning the consistency of the proposed rule with the 1986 "Memorandum of Agreement Between the Assistant Administrators for External Affairs and

Water U.S. Environmental Protection Agency and the Assistant Secretary of the Army for Civil Works Concerning Regulation of Discharges of Solid Waste Under the Clean Water Act" ("1986 MOA") and related agency documents.

Some of these commenters generally pointed to the 1986 MOA and the "primary purpose test" in the Corps definition of fill material as presenting a strong argument that materials are prohibited under the Section 404 program when they are "pollutants" being discharged into a water of the US "primarily to dispose of waste," and thus should be regulated under Section 402 of the Act by EPA as a point source discharge.

The 1986 MOA is intended to provide guidance to the Corps and EPA on how to determine the applicability of Section 404 or 402 to solid waste discharges in light of the differing EPA and Corps definitions of fill material. Because it is only guidance, it cannot and does not establish legally binding requirements, nor is it prescriptive in nature. It provides factors to be considered when making the determination of which permitting regime to apply, but does not direct or instruct how the factors are to be considered or balanced to reach a conclusion. In fact, it explicitly recognizes that there will be cases where application of the factors it contains will not provide a clear answer, or the agencies may disagree as to which permit regime should be applied. 1986 MOA, Section C. 1 and 2. As explained in the proposed rule preamble (65 FR 21297), and will be addressed further below, we believe the approach being taken in reconciling the regulations is generally consistent with the 1986 MOA.

With regard to the Corps regulations defining fill material, those regulations provide in part:

> The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, *as that activity is regulated under Section 402 of the Clean Water Act.* 33 CFR 323.2(e) (2001) (emphasis added)

Under EPA's long standing definition of what constitutes fill material (and thus *not* subject to Section 402 (see CWA Section 402(a)(1)), fill material is defined as material that has the effect of fill, without regard to the purpose of the discharge. We thus do not agree that under the differing EPA and Corps regulations it is simply clear by referring to the Corps regulations alone that pollutants discharged to dispose of waste are not subject to Section 404; rather, the contents of *both* regulations need to be taken into account. Moreover, as noted in the prosed rule's preamble (65 FR 21295) the Corps has historically regulated valley fills under Section 404.

Some of the comments pointed to specific language in the 1986 MOA as indicating that mine waste was properly the subject of Section 402 and not Section 404. Several of these commenters cited Section B.5. of the 1986 MOA. That provision states:

> "On the other hand, in the situation in paragraph B.3, a pollutant (other than dredged material) will normally be considered by EPA and the Corps to be subject to Section 402 if it is discharged

> in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogeneous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the Corps will identify additional such materials."

These commenters saw the proposed rule as a repudiation of that provision. Some of these comments further pointed to a cover memorandum from Lawrence Jensen, then-Assistant Administrator of the Office of Water, to Regional Administrators transmitting the 1986 MOA which stated wastes of a homogenous nature normally associated with a single industry and discharged from a fixed conveyance, or if trucked from a single site such as fly ash, are subject to the Section 402 program.

As explained previously, under today's rule, we will continue, consistent with our long-standing practice, to rely on the existence of effluent limitation guidelines or standards or an NPDES permit to inform the determination of how a particular discharge is regulated under the Act. If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa. As explained in the proposed rule's preamble (65 FR 21296), many of the discharges referred to in Section B.5. of the 1986 MOA are subject to effluent

guidelines and NPDES permitting, and today's rule would not alter that existing scheme. Moreover, when Section B.5. of the 1986 MOA was adopted, the EPA regulations defining fill material, like today's rule, defined fill material as material that has the effect of replacing waters of the U.S. with dry land or changing the bottom elevation. We thus do not agree that today's rule is inconsistent with or repudiates that 1986 MOA provision.

One of the commenters further indicated that the 1986 MOA outlined four factors for determining whether a specific waste was properly regulated under Section 404 or Section 402, stating that each factor, if it applied to the material at issue, meant that the material should be regulated under Section 404. The commenter concluded that three of the four factors listed in the 1986 MOA (Sections B.4.a, b, and d) weighed in favor of overburden being regulated by EPA under Section 402, with only one factor (Section B.4.c) weighing in favor of Section 404.

We do not agree that only one factor in Section B.4 of the 1986 MOA weighs in favor of regulating overburden under Section 402 as the commenter asserts. With regard to the comment's suggestion that Sections B.4.a, b, and d weigh in favor of overburden being regulated under Section 402, we note that Section B.4.d refers to heterogenous discharges of the type "normally associated with sanitary landfills," and thus appears inapplicable in the case of overburden rather than affirmatively indicating it is subject to Section 402. With regard to Section B.4.b., overburden consists of rock and dirt and thus is similar in nature to materials generated by construction-type activities, such as road cuts that generate waste rock and dirt. The 1986 MOA does not specify how to

weigh and balance the various factors it contains, and as noted above, Section C of the 1986 MOA explicitly recognizes this and calls for inter-agency discussions when the factors specified in the MOA do not resolve the issue.

Other comments questioned the status of the 1986 MOA, indicating that it was intended to provide only interim section 404 jurisdiction and pointing to language in Section E.2. as indicating it expired when EPA's RCRA Subtitle D regulations were published in 1991. Some of these comments pointed to the *RII* decision as supporting that view. One of these comments focused on issues related to the applicability of Section 404 to solid waste landfills, asserting that the discussion in the proposed rule preamble of the 1986 MOA between EPA and the Corps regarding the "temporary" assertion of jurisdiction over landfills by the Corps was inaccurate and misleading. This commenter further indicated that in a case asserting a temporary regulatory taking of a landfill by the Corps of Engineers, both former and existing Corps officials have testified under oath that the MOA was intended to impose interim jurisdiction only until the states took over their solid waste responsibilities under RCRA Subtitle D. The commenter concluded that it was simply untrue that the Corps' "consistent intent" has been to regulate solid waste landfills.

We note that by its very title the1986 MOA concerns "regulation of *discharges of solid waste*" (emphasis added), not the broader question of Section 404 jurisdiction over other landfill activities, such as their construction or maintenance. It thus does not have a bearing on Section 404 jurisdiction over discharges of material used to create landfill in-

frastructure such as berms, liners, and the like, which under both of the differing Corps and EPA definitions are fill material. Further, Section A.5 of the 1986 MOA describes the basis of the agreement, indicating the MOA addresses "the uncertainty as to whether Section 402 of the Act or Section 404 is intended to regulate discharges *of solid waste materials into waters of the United States for the purpose of disposal of waste* . . ." (emphasis added). Because it addresses only solid waste discharges, we do not agree that the 1986 MOA reflects an intent to assert "interim jurisdiction over solid waste landfills by the Corps."

Moreover, in the preamble to the rule adopting the primary purpose test and waste exclusion, the Corps specifically recognized that jurisdiction under that regulation still remained for creation of landfill infrastructure:

> "During the two years of experience with the Section 404 program, several industrial and municipal discharges of solid waste materials have been brought to our attention which technically fit within our definition of "fill material" but which were intended to be regulated under the NPDES [CWA § 402 permit] program. * * *
>
> The Corps and [EPA] feel that the initial decision relating to this type of discharge should be through the NPDES program. We have, therefore, modified our definition of fill material to exclude those pollutants that are discharged into water primarily to dispose of waste. *We will process Section 404*

> *permits for these types of activities to the extent that a levee or other type of containment structure must be placed in the water as part of the overall disposal plan.*"
>
> 42 F.R. 37,122, 37,129 (July 19, 1977) (emphasis added).

Similarly, the proposed rule was intended to recognize as a discharge of fill material "placement of material for construction or maintenance of . . . infrastructure associated with solid waste landfills" (65 FR 21300). It would not have asserted Section 404 jurisdiction over actual solid waste going into the landfill cells, and as noted elsewhere, today's rule has been modified to specifically exclude disposal of trash garbage and the like from being fill material. In addition, as explained Section II C. of today's preamble, in implementing Section 404, the Corps will emphasize effective coordination with other relevant programs such as RCRA, and consistent with its legal responsibilities, rely as appropriate, on the information developed and conclusions reached by other agencies to support the decisions required under that program. Readers are also referred to the previous discussion in today's preamble for issues related to the applicability of Section 404 to landfills and the *Resource Investment* case.

With regard to the status of the 1986 Solid Waste MOA, we also do not agree that it has expired. Section 5.E.2. of the 1986 MOA provides it may be extended by mutual agreement, and both EPA (58 FR 9337) and the Corps (May 17, 1993, memorandum from John Studt, Chief Regulatory Branch, U.S. Army Corps of Engineers) have indicated the MOA remains in effect.

One commenter stated that the 1986 MOA contains language that is potentially confusing and inconsistent with the proposed rule and the accompanying preamble and recommended that while they believed the 1986 MOA contains some provisions worth maintaining, it also contains others that should be reworked consistent with the proposed rule and current permitting practices. This commenter pointed to Section B.4.d of the 1986 MOA as providing that a discharge will normally be considered to meet the definition of "fill material' if heterogeneous in nature and of the type normally associated with sanitary landfill discharges, whereas in the preamble to the proposed rule, the agencies proposed to adopt a definition of "unsuitable" fill material that would include in most instances "heterogeneous solid waste," thereby excluding from the Section 404 permit program materials that would satisfy the language in Section B.4.d of the 1986 MOA. This commenter also pointed to Section B.5 of the 1986 MOA (which addresses "solid material of a homogeneous nature normally associated with single industry wastes") as resulting in confusion and inconsistent positions for materials generated by hard rock mining.

We agree that in many respects the 1986 MOA did not fully resolve issues associated with the discharge of solid waste. This is not surprising as it was developed under a regulatory framework involving differing definitions of fill material, and as guidance, could not depart from those regulations or establish mandatory or prescriptive criteria. Following promulgation of today's rule which results in a single and consistent definition of fill material, we will be revisiting the 1986 MOA to determine if it is still

necessary, and if so, what modifications might be appropriate.

One commenter opposing the proposed rule requested that if it nonetheless is issued, language in Section B.6. of the 1986 MOA be retained, which provides for a State determination to be provided prior to application processing that the proposed discharge will comply with applicable provisions of State law, including applicable water quality standards. The commenter indicated this was necessary in order to keep Corps districts from becoming immersed in disputes over siting of wasting facilities.

We will take this comment into account in reviewing the 1986 MOA. We also note that Section 401 of the CWA itself requires any applicant for a Federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the U.S. to obtain a certification from the State as to compliance with applicable provisions of State law, including applicable water quality standards. With regard to Section 404 permits, the Corps has in place regulations addressing the nature and timing of such 401 certifications. See e.g., 33 CFR Part 320.

One commenter provided lengthy historical information asserting that the proposed rule's preamble description of how the differing definition of "fill material" came into being incorrectly ascribing this divergence to actions by the Corps. We appreciate submission of this information, but note that the preamble language in question (65 FR 21294) was intended only as brief background chronology, not to explain how the definitions came to differ.

Other comments pointed to a March 19,1984, letter from William R. Gianelli, then Assistant Secretary of the Army for Civil Works, to William

Rucklelshaus, then Administrator of EPA, which was cited in the *RII* case at 151 F.3d 1169. These comments pointed to language in that Department of Army letter stating:

> "This follows up on discussions our agencies have had over the years about the proper way to regulate garbage disposal and other waste disposal in waters of the United States.
>
> EPA has many solid waste responsibilities under its RCRA programs and has developed expertise in that area. Army has very limited expertise. Hence we would have to establish duplicative expertise which may well result in policies and technical decisions which differ from those of EPA. It would not be in the best interest of Government for EPA to work with the States under RCRA under one policy and Army to operate under a 404 permit program for garbage disposal on a different basis. It is logical to identify regulations of garbage disposal with EPA's current and historic mission. It strains reason to have the Army Corps of Engineers, with its primary military and navigation missions, to lead this garbage disposal regulation."

They commenters believed that letter indicates that while EPA has many solid waste responsibilities under its RCRA programs and has developed expertise in that area, the Corps has very limited expertise.

The letter in question addresses the "proper way to regulate garbage disposal." As explained elsewhere in today's preamble, we have modified the proposal in today's rule to generally exclude trash or garbage from the definition of "fill material." We thus believe today's rule to be consistent with the referenced letter. We also note that since 1984, through its dredged material management program, the Corps has gained considerable expertise with regard to disposal of geological materials and sediments dredged from waters of the U.S. See for example, Inland Testing Manual. EPA/USACE, 1998. Evaluation of Dredged Material Proposed for Discharge into Waters of the U.S. — Testing Manual. EPA-823-B-98-004, Washington, DC. Moreover, as explained in the preamble to the proposed rule (65 FR 21296), where discharges of solid waste subject to Section 404 also result in the discharge of effluent to waters of the U.S., the effluent discharge would require a Section 402 permit and thus be subject to applicable technology and water quality based standards under that program.

D. CWA regulation of activities related to mining practices

Some commenters generally agreed with the language relating to mining activities and by-products provided in the definition of "discharge of fill materials." One commenter indicated that the addition of examples served to "clarify Section 404's applicability to solid waste landfills and placement of coal mine overburden." Many of these commenters wrote in to explain the practical realities associated with certain types of mining activities. They agreed that utilizing Section 404 authority is the only reasonable approach under which mining activities can be per-

mitted. A result other than that proposed by the rule, commenters said, "could deal a crippling blow" to the mining industry. One commenter did, however, voice concerns over the current Corps practice of permitting "valley fills" under the authority of Section 404 and thus disagreed with the inclusion of mining activities at all in the definition of "discharge of fill material."

Commenters had concerns though with the identification of only one particular mining activity (coal mining) and one particular by-product of mining activities (overburden). They suggested that the "singling out" of coal mining overburden may leave the impression that other mining activities and their related by-products are not intended to fall within this definition, leaving to question if mining activities, other than the coal industry, fall into Section 404 regulation. Some commenters further suggested that the rule draws an 'arbitrary distinction" among types of mining by the specific inclusion of coal mining overburden as an example of fill in the language of the rule. These commenters stated that the specific inclusion of coal mining related materials may result in differing treatment under the regulations of other forms of mining overburden. This, commenters suggest, will create significant uncertainty in other sectors of the mining community.

Under the CWA, the regulatory programs of the Corps and the EPA are concerned with "discharges' into waters of the United States and their related effects. In general, Section 404 discharges into waters of the United States that are associated with mining activities primarily fall into two broad categories: the discharge of overburden materials, and the discharge of mining by-products

such as those resulting from mining beneficiation or the processing of mined materials. Overburden materials typically consist of the same kinds of rock and soil materials that are typically utilized for construction fills which, when discharged into waters of the United States, have traditionally been regulated by the Corps under section 404 of the CWA. In contrast, the mining by-products may have a slightly different physical form from the traditional rock and soil used as fill material, but it can have the same effect on the aquatic environment as those materials. Where the discharge of both types of materials into waters of the United States will result either in a change in the bottom elevation, or in the replacement of the waters with dry land, both materials clearly qualify as "fill material" under this rule, and their discharge into waters of the United States will be regulated by the Corps under section 404 of the Act.

However, the scope of the Corps' review of such discharges normally will encompass the direct, indirect, and cumulative effects on waters of the United States. Under Section 404, the agencies may not evaluate or control mining activities that are otherwise not regulated under the CWA.. **The CWA does not regulate mining activities, per se. However, as indicated, some activities that are associated with mining do involve discharges of materials into waters of the United States.**

In the so-called 'valley fill' situations, coal mining interests under certain circumstances have no practicable alternative to placing the rock and soil overburden, slurry, tailings and similar materials from mining operations into valley areas that most typically contain streams and wetlands. Mining activities, other

than coal mining, are sometimes faced with similar situations. Both the Corps and the EPA agree that the placement of these materials in areas that qualify as waters of the United States must be regulated, but not absolutely prohibited, under section 404 of the CWA. While some Corps Districts have been regulating mining discharges in the manner the agencies believe appropriate, today's rule will clarify the agencies' position for all regulators and members of the public and result in uniform application of these important requirements.

Accordingly, we disagree with those comments that urge us to maintain the confusion created by the Corps and EPA having different definitions for the term 'fill material' with the purpose being to curtail all mountaintop mining and other similar mining practices. We believe that the appropriate application of these key jurisdictional terms and of the Section 404 permit requirements, in the context of specific requests for authorization, can result in the authorization of activities that are consistent with the CWA requirements. It is not within the purview of the Corps' and EPA's authority to address alleged problems associated with mining practices that go beyond those associated with discharges into waters of the U.S.

E. Environmental Effects of Proposal

Many commenters opposed to the rule expressed concern that it would have broad and far-reaching environmental effects, characterizing it as allowing the use of waters of the U.S. as dumping grounds for excess mine overburden and other solid wastes, and

asserting that the rule would result in a dramatic increase in such dumping These commenters contended that mountaintop removal coal mining and the use and size of valley fills associated with this practice, in particular, would increase, referencing the fourfold increase in affected areas in West Virginia over the past twenty years as an example. Many commenters asserted that the proposed rule would result in a backsliding from improvements in water quality gained through the CWA and SMCRA.

We believe that the preamble to the rule addresses these concerns at length. In sum, we disagree that today's rule would have any significant effect on the environment, including encouraging mountaintop mining activities. Today's rule is consistent with EPA's longstanding definition of fill and the current practice of regulating valley fills under section 404. Today's final rule simply brings improved consistency and clarity into the regulations. This improvement will lead to more effective implementation of the CWA, thereby strengthening environmental protection. The rule should not be misread as opening U.S. waters to uncontrolled waste; analysis under the guidelines and appropriate mitigation provide the most appropriate framework for assessing and responding to proposed impacts.

A number of comments also detailed past, present, and possible future ecological effects of mountaintop mining coal removal, and other mining practices which involve fill material. For example, the comments stated that more than 300,000 acres of hardwood forests in West Virginia have been destroyed by the practice of mountain top mining. Many noted that the forests of Appalachia are among the most productive and diverse in North America,

that they are vitally important to migratory birds, and that many species are unique to Appalachia. Many commenters referred to affected areas as being among the richest temperate freshwater ecosystems in the world. Others discussed the various effects to underlying streams and surrounding areas, including impacts on air quality, stream hydrology, temperature, runoff, aquifer recharge, and the aquatic and terrestrial life (including impacts on threatened and endangered species) that depend on the affected streams and neighboring habitats. Others discussed the pollution in immediate and downstream areas, such as acid and toxic mine drainage, as well as possible effects of other polluting waste, noting that contamination has rendered many streams lifeless. Some commenters noted that negative effects would extend downstream all the way to coastal wetlands and estuaries.

Comments also provided information on current conditions of natural resources as evidence of the already degraded environment, noting that 750 miles of streams have been filled in West Virginia, and that 12,000 miles of streams in the U.S. have been contaminated from mine overburden, many of which have not yet been reclaimed. Two commenters noted that the Coal River in West Virginia has been named as one of the country's most endangered rivers for the past two years due to mountaintop removal coal mining, and expressed concern about the cumulative impacts of future valley fills creating new waste streams into already degraded rivers. Another commenter found discrepancy between the legal practice of mountaintop removal coal mining and the illegal use of dynamite for fishing of coral reef fish in marine environments. Many expressed concern about the extent and permanence of effects on the envi-

ronment, such as changes in landscape, contour, and habitat, effects on downstream water quality when headwaters, streams and wetlands are removed from the watershed or carry contaminated waste, and the future cumulative impacts to rivers and watersheds in impacted areas. Furthermore, they argued that mining companies have not taken responsibility to restore and rehabilitate land and waters affected in the past, and that EPA and the Corps have failed to require such measures.

We maintain that by improving consistency and clarity, today's rule increases regulatory effectiveness. Furthermore, many of the wide range of impacts detailed in the comments are not within the jurisdiction of the Corps and EPA. The Office of Surface Mining (OSM) has authority to address concerns such as stream hydrology, water quality, acid and toxic mine drainage, landscape contour, the restoration and rehabilitation of affected areas, and the use of explosives in relation to mining under the SMCRA §515(b). OSM sets specific environmental protection performance standards under SMCRA, which addresses the environmental concerns voiced in comments. While improvements in the regulation of mining practices is worthy of attention, this rule is not the vehicle for addressing the range of issues identified in the comments.

Numerous commenters maintain that this rule will have direct effects on human health, and were particularly concerned about the contamination of drinking water. Several comments stated that drinking water sources in some coalfield communities are no longer reliable, forcing communities to either pay for systematic purification or to purchase purified drinking water. One commenter indicated that many

families cannot afford to pay for clean drinking water. Part of EPA's mission is to ensure safe drinking water, and under the Safe Drinking Water Act, EPA has the authority to set drinking water standards to control the level of contaminants in the nation's drinking water and to regulate publicly-or-privately-owned drinking water systems which serve 25 people or more. EPA does not regulate private wells that supply water to fewer than 25 people, or private drinking water supplies from streams or cisterns, but works closely with our State, Tribal, and local partners to prevent contamination of drinking water supplies at the source.

Many commenters from the affected communities discussed other impacts from mountaintop removal coal mining, such as increased flooding, damage to the structural integrity of homes and other buildings, dust, noise, and vibration from blasting. Some contended that families have been uprooted due to unfavorable living conditions, sometimes leaving homes or communities that have existed for many generations, resulting in the loss of cultural heritage in Appalachia. In addition, many commenters mentioned the adverse impacts on aesthetics, historic sites, water recreation and tourism. We appreciate these concerns, and again stress that OSM has authority over many of these impacts, and in particular that explosives are used only in accordance with State and Federal laws and regulations (SMCRA §515(b)(15)). Moreover, OSM must ensure blasts do not damage property outside the permit area.

Other comments viewed the proposed rule as a weakening of federal protection. One commenter argued that the proposed rule would make it impossible to comply with wetland rehabilitation and

recovery mandates, TMDLs, and the Clean Water Action Plan. Another comment argued that the proposed rule contradicts the *Report to Congress: Waste from the Combustion of Fossil Fuels*, in which EPA held that coal combustion waste in mined lands were strongly acidic. Today's rule represents a coordination of efforts aimed at minimizing confusion and inefficiency in the evaluation and development of mitigation for proposed projects, and thus works towards the goals of the Clean Water Action Plan. Anti-degradation policies provide for the protection of existing uses in waters and the level of water quality necessary to protect those uses. EPA interprets 40 CFR 131.12(a)(1) of the anti-degradation policy to be satisfied with regard to fills in wetlands if the discharge does not result in "significant degradation" to the aquatic ecosystem as defined in the Section 404(b)(1) Guidelines. Furthermore, it is still the case that coal combustion wastes are regulated under RCRA Subtitle D (Federal Register 40 CFR Part 261). We believe that today's rule is consistent with current federal laws and regulations.

We maintain that by improving consistency and clarity, today's rule increases regulatory certainty but will not have any significant effect on the environment, and will not cause the other effects of concern related to mountaintop mining operations. While specific proposals to undertake mountaintop mining and discharge fill material into waters of the U.S. will have environmental and other effects, today's rule does not authorize or otherwise address those effects, which are, however, addressed in the context of the section 404 and SMCRA permitting processes. Therefore, nothing in this rule is inconsistent with environmental protection principles under various aspects of the CWA or with EPA's regulatory

determination relating to fossil fuel combustion wastes under RCRA, which was solely concerned with whether regulation of those wastes under subtitle C of RCRA was warranted. Furthermore, many of the wide range of impacts detailed in the comments are not within the jurisdiction of the Corps and EPA. The OSM has authority to address concerns such as stream hydrology, water quality, acid and toxic mine drainage, landscape contour, the restoration and rehabilitation of affected areas, and the use of explosives in relation to mining under SMCRA §515(b). OSM sets specific environmental protection performance standards under SMCRA, which reflects the environmental concerns voiced in comments.

F. Unsuitable Fill Material

Many commenters raised concerns over the proposal's discussion of including an "unsuitable fill material" provision in the Corps' regulations that would seemingly have replaced the waste exclusion currently defined by the Corps' regulations. They indicated that the proposed definition of unsuitable fill was "too weak and vague" to adequately replace the waste exclusion as currently embodied in the Corps regulations. Commenters cited to the preamble language indicating that "unsuitable" materials could include those that have the potential to leach contaminants. They identified this as overly broad and indicated that it provided little guidance as to what materials may be considered "unsuitable" and therefore not permitable. Commenters suggested that this would add new uncertainty into the regulatory process and was contrary to EPA's and the Corps' stated intent not to alter current permitting practices. Similarly, one commenter noted that the April 2000

preamble discussion of homogeneity and heterogeneity as a determining factor for the suitability of fill material was confusing, particularly because both terms are used to describe materials that would not permitted under section 404. Specifically, the commenter was seeking clarification as to whether the proposed rule intended to exclude from section 404 only those entrained solids contained in water discharged pursuant to section 402, rather than any waste materials that may contribute contaminants to water.

In contrast, some commenters indicated that the definition, while useful in addition to the waste exclusion, was not broad enough to capture some discharges that they deemed also unsuitable as fill material. These commenters also generally argued that the appropriate place for this provision would be in the rule itself, as opposed to the preamble where it appeared in the April 2000 proposal.

Some commenters suggested that the agencies' comparison of unsuitable fill in the April proposal to the existing general condition addressing unsuitable fill which is applicable to all nationwide permits was inappropriate. These commenters stated that the general condition should not be use as a basis of support for widespread use elsewhere under section 404 as it is not justified due to the significant differences between individual permits and nationwide permits. Commenters further suggested that the concept of unsuitable fill is already adequately addressed by the Section 404(b)(1) Guidelines and related evaluation, thus the process for review of individual permits should remain as it stands now.

As it pertains to granting the Corps District Engineer discretionary authority to refuse to process a

section 404 permit application, commenters raised concerns that this would exceed the Agency's authority under the CWA. This, one commenter stated, undermines the "statutory scheme which contemplates reasoned decision making after notice and opportunity for a public hearing." One commenter indicated that this would "inject uncertainty into the process' and could lead to inconsistencies amongst the Corps Districts throughout the country. Commenters also indicated that the nature of the material should not be the only factor considered when making a determination to review a permit application or render a decision under section 404, as is suggested by the preamble discussion. Questions were also raised as to an applicant's right to appeal, either administratively or judicially, under the proposed scheme. Commenters indicated that the probability of numerous judicial appeals of decisions under this provision would seriously undercut the Agencies' purported reasoning for the suggested revision, conservation of limited Corps resources.

The agencies have not included an unsuitable fill category in the final rule but, as discussed in the preamble, the final rule does narrow the scope of "fill material" by excluding trash or garbage. **Since neither the Corps nor the EPA intended the proposed rule to imply that materials such as trash or garbage were suitable materials for placement in waters of the United States as fill, the preamble to the April 20, 2000 proposed rule alluded to a prospective administrative protocol under which Corps District Engineers could refuse to process a permit application if it was determined that the material proposed for discharge into waters of the U.S. was unsuitable as fill. After a review of the comments**

received on this proposal, the Corps concluded that, without specific criteria for determining what constituted such 'unsuitable' materials, these determinations by District Engineers could be inconsistent and thereby confusing to the regulated public. Therefore, the Corps and the EPA have abandoned further consideration of including an unsuitable fill category in the final rule.

However, the agencies have added an exclusion for trash or garbage to the definition of "fill material. " There are several reasons, for this exclusion. First, the preamble to the proposed rule and many of the comments recognized that certain forms of traditional solid waste material such as garbage, trash, debris, junk cars, used tires, discarded kitchen appliances, and similar materials are not appropriately used, as a general matter, for fill material in waters of the U.S. We agree that the discharge of such materials often results in adverse environmental impacts to waters of the U.S. by creating physical obstructions that alter the natural hydrology of waters and may cause physical hazards and other environmental effects. We also agree that these impacts are generally avoidable because there are alternative clean and safe forms of fill material that can be used to accomplish project objectives and because there are widely available landfills and other approved facilities to receive these kinds of materials for disposal Yet, the agencies also recognize that there are very specific circumstances where the placement of such materials in waters of the U.S. is associated with an appropriate project and

would be consistent with their regulation as "fill material" under CWA section 404. As such, the fmal rule does not include an unsuitable fill category but does include an exclusion for trash or garbage.

G. NEPA Comments

EA/EIS compliance. Commenters disagree with the Corps' assessment that no Environmental Impact Statement (EIS) was needed to evaluate the potential impacts of this rule to the human and aquatic environment One commenter indicated that the conclusion reached to not prepare an EIS was arbitrary and capricious. Commenters argue that the rule will have significant environmental consequences and this information must be made available to the public through the NEPA process. They added that this information should have been provided prior to issuance of the proposed rule.

Moreover, commenters disagree that environmental documentation during the permitting phase is sufficient. Commenters noted that this approach is flawed, as many mining discharges are permitted under the nationwide permit program which does not require individual environmental review. The potential impacts, one commenter suggested, are "staggering" given that, according to statistics, the Corps grants most permit requests.

While supporters of an EIS suggest that finalizing this rule will result in significant new discharges that previously would not have occurred, the Agencies maintain that this is not the case. The rule seeks only to clarify the appropriate regulatory framework and thus we do not expect there to be any significant change in the nature and scope of discharges that will occur. **As was indicated in the April 20, 2000,**

Federal Register notice of the proposed rule, the Corps has prepared an environmental assessment of the final rule. This assessment concludes that the adoption of the final rule reconciles the Corps and EPA definitions of the term "fill material" by adopting an effects-based definition, and by excluding materials such as trash and garbage, in most circumstances. The Corps' environmental assessment indicates that the adoption of this rule will minimize the confusion that was previously caused by the differing Corps and EPA definitions of "fill material." The environmental assessment concludes that the adoption of this rule simply clarifies agency roles and responsibilities under the CWA. As such, it facilitates the proper regulation of prospective discharges into waters of the United States, as intended by the Act. The Corps' environmental assessment ultimately concludes that, since the adoption of this rule will not significantly effect the quality of the human environment, the preparation and coordination of an EIS is not required. The EA, included in the administrative record for this rule, explains further the rationale for the Corps' conclusion.

Nonetheless, we appreciate the commenters concerns as they pertain to the implementation of nationwide permit 21. The Corps will be proposing regional conditions to nationwide 21 in the Appalachian states to help reduce the environmental impacts resulting from authorized discharges under this permit.

Ongoing Programmatic EIS. In general, commenters stated concerns that the proposal to clarify

the definition of "fill material' is being improperly initiated prior to the completion of an EIS assessing the environmental effects of mountaintop mining operations to waters of the United States and to fish and wildlife resources, within which, the proposed rule may be identified in the analysis as one alternative. One comment characterized the action as "ill-timed" and "aimed at providing an answer before the Draft EIS is issued." Another comment indicated that moving forward with the rule prior to the issuance of a Record of Decision on the EIS is not permissible under the CEQ regulations. Commenters also expressed concern over the impact the proposed rule may have on the adequacy and completion of the EIS, as well as its potential for adverse environmental impacts.

We do not agree that this proposal is being initiated improperly prior to the completion of this EIS. The defined action of the EIS is to

> ...consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources from mountaintop mining operations, and to environmental resources that could be affected by the size and location of fill material in valley fill sites.

The EIS presumes that the materials deposited as a result of practices associated with mountaintop mining will continue to be regulated as fill material by the Corps. It is believed that the actions undertaken as part of the EIS process, aimed, in part, at

analyzing the permitting process, will complement the implementation of the proposed rule by providing additional recommendations on improved coordination on permitting decisions as well as further evaluation of agency policies and practices with a view towards implementing additional regulatory improvements.

Furthermore, finalization of this rule should not await the completion of the Draft EIS. The Draft EIS is currently scheduled to be released in the Fall of 2002, followed by a 45 day comment period. Delays in the completion of the EIS have resulted from the time needed to secure adequate funding to initiate field studies, the desire to study the environmental effects of mountaintop mining operations over a series of seasons, and difficulties arising from the economic analysis being conducted by West Virginia University. Confusion amongst the regulated community currently exists in the day to day operations of the program in the field. This rule seeks to address that confusion by providing a uniform definition and should not be delayed by an EIS that already assumes this to be standard practice.

H. Federalism

Two commenters expressed concern that, contrary to the preamble, the proposed rule did have profound federalism implications, and that omitting a discussion of these implications was a violation of Executive Order 13132, which requires meaningful input from state and local officials when a proposed rule has substantial direct effects on the distribution of power and responsibilities among various levels of government. They argued that by attempting to assert section 404 jurisdiction over State-permitted RCRA landfills, the proposal would result in the

Corps potentially contradicting and "vetoing" land use and landfill siting decisions specifically left or delegated to the States and local government authorities. One of these commenters also expressed the view that, by requiring a federal "public interest" decision on the use of land in addition to a state decision, the Corps would be injecting itself into the area of land use, which is an area of regulation traditionally and intentionally left by Congress and the U.S. Constitution to state and local authorities.

One of the commenters also viewed the Ninth Circuit's decision in *RII* as ruling that Corps jurisdiction over solid waste landfill was prohibited because of federalism implications, pointing to *RII* as holding that jurisdiction was "unreasonable" because it was "duplicative," because it could lead to inconsistent decisions between State and federal agencies applying the same standards, and because the Corps' own regulations provided that state and federal wetland programs "should complement rather than duplicate one another." 151 F.3d at 1169. The commenters stated that changing the definition of "fill material" to include landfill structures would reintroduce the very duplication and inconsistent state and federal regulation that the Ninth Circuit held impermissible under RCRA and the CWA. At a minimum, the commenter argued, these federalism implications must be acknowledged, and state and local input sought, as the Executive Order requires.

In response, we refer you to section III. C.2 for a discussion of the *RII* case. Moreover, we note that Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires us to develop an accountable process to ensure "meaningful and timely input by State and local officials in the devel-

opment of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." We continue to believe for the reasons explained in the preamble to the final rule that today's rule does not have such substantial direct effects, and thus does not have Federalism implications.

One of the commenters raising federalism concerns further indicated these concerns were especially significant as "the Corps has asserted 404 jurisdiction over virtually every water body, drainage and erosional feature," including isolated waters used by migratory birds. This commenter believed that the current proposal would regulate all solid waste landfills that affect any waters of the U.S., constituting a "nearly total duplication" of state RCRA Subtitle D programs.

In response we note that the test for jurisdiction under section 404 is whether there is a discharge of dredged or fill material into waters of the U.S., not whether the landfill "affects" waters of the U.S. Second, since this comment was made, the US Supreme Court ruled on January 9, 2001, that CWA section 404 jurisdiction does not in fact extend to non-navigable intrastate waters based solely on their use by migratory birds. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). The agencies issued a joint legal memorandum on January 19, 2001, to that effect which is available on EPA's Website at

http://w rw.epa.gov/owow/wetlands/swanccnav.html. Today's rule does not address the scope of geographic jurisdiction under the CWA.

I. Economic Effects of Proposal

A number of commenters expressed concern about the economic effects of the proposal on the surrounding communities or State or local economies, including concerns that economic impacts associated with the proposal were not evaluated in depth. Some of these comments expressed concern that economic impacts on timbering and farming were not addressed, while others noted the potential for impacts to commercial and subsistence fisheries, even in coastal areas. Others expressed concern that the proposal would result in people baying to buy drinking water because their well water has either dried up or has been contaminated by mountaintop removal mining. Still others expressed concern that allowing mining companies to place waste in streams would cause serious harm to future economic growth plans in Appalachia. These comments indicated tourism and recreation are important to future economic growth in Appalachia and are also dependent on a heathy environment and clean water.

A number of commenters expressed concerns that local communities would suffer the economic costs from a destroyed environment and would require federal taxpayers to pay billions in cleanup costs. These comments stated that although there is a federal trust fund to pay for cleaning up old coal sites, there is no money for cleaning up new damage that coal and hardrock mines would cause under the proposed rule. They asserted the Department of the Interior estimates cleaning AML sites in America will cost over $8 billion, with over half for clearing

out clogged streams and cleaning up water to make it drinkable.

We do not believe today's rule will result in significant economic effects. Neither the proposal or today's rule has the effect of authorizing the placement of waste material in waters of the U.S. Rather, it clarifies which regulatory regime, section 402 or section 404, is applicable. In addition, it does so in a way that is consistent with the current approach of using section 404 to regulate discharges of coal mining overburden.

Other comments asserted that allowing placement of mine waste in waters of the U.S. supports coal production cost savings that are economically short-sighted, resulting in primarily short-term job growth, while sacrificing natural surroundings and future water quality. (Some noted that mining jobs have actually declined despite increases in coal production.) Others argued that, by making it easier and less expensive to mine coal, the proposed rule would be harmful by encouraging inefficient infrastructure development and unsustainable levels of consumption, thus ensuring quicker depletion of coal resources, while ultimately impeding a transition away from fossil fuels. Several comments viewed the proposal as a subsidy and one recommended the alternative of allowing market forces to set the price of coal within the current regulations.

These comments address issues related to national energy policy and the role of coal in energy production. Today's rule addresses matters related to the applicability of section 404, and issues related to the appropriate role of coal or other fossil fuels in national energy policy are outside the scope of today's rulemaking.

J. Suggested Alternatives or clarifications

1. Issue Guidance or revise MOA instead of modifying the rule

Some of the comments criticized the agencies for not considering less drastic alternatives to the proposed rulemaking. One comment, in particular, suggested that the agencies could have satisfied the goal of eliminating the potential abuse of the primary purpose test without the dramatic adverse effects associated with eliminating the test itself and the waste exclusion. Some alternative approaches included issuing guidance indicating that the Corps, rather than the applicant, would establish the primary purpose test of a proposed project Another suggested alternative was issuing guidance clarifying how placement of heterogeneous solid waste and landfill liners should be regulated under sections 402 or 404, and RCRA. The commenter suggested that such guidance ban the placement of those materials in wetlands, as has been done in Kentucky. Another comment asserted that the proposal was inconsistent with the existing 1986 MOA and suggested that the agencies clarify the MOA as an alternative means of eliminating regulatory confusion.

The agencies do not agree that their goals for this rulemaking could be accomplished through the issuance of guidance. First, the issuance of guidance would not alter the fact that the two agencies responsible for administering the section 404 program have different definitions for the same key jurisdictional term. Conforming the agencies' regulations can only be corrected through a rulemaking. Second, the programmatic issues created by the courts' analyses in the *RII* and *Bragg* cases stem from the regulatory language in the Corps' regulations, which

is not amenable to being resolved by guidance. Finally, the agencies do not agree that the proposed rule contradicts the existing MOA.

2. Eliminate primary purpose but retain waste exclusion

Another suggested example of a more limited approach to revising the definition of "fill material" was eliminating the primary purpose test but retaining the waste exclusion. One group noted that this approach still would allow the Corps to regulate the use of wood chips and landfill liners under Section 404, while preventing the dumping of waste. Elimination of the primary purpose test without retention of the waste exclusion, argued commenters, would impermissibly extend the scope of the Corps' authority to permit waste disposal, even with the revised definition of "unsuitable fill material," to which one commenter referred as vague, narrow and porous.

Another commenter, representing several environmental groups, asserted that applying a purpose-based waste exclusion would not create additional burdens for the Corps, because analysis of "overall project purpose" and "basic project purpose" is already required under the section 404(b)(1) Guidelines. In fact, the comment noted that the identification of project purpose was an essential part of the practicable alternatives analysis - the heart of the 404(b)(1) Guidelines. The comment noted that the Corps' experience, plus an ample body of judicial decisions providing guidance on project purpose should be sufficient for the Corps to determine when the purpose of an activity is waste disposal. This comment suggested that the Preamble discussion of the difficulty associated with applying the waste ex-

clusion called into question the Corps' ability to implement the Section 404 requirements, in general.

This comment recommends that the Corps amend the regulation to make clear that the determination of whether the project's purpose is waste disposal would be made by the Corps and EPA, and not the project applicant and further that the determination would be based on an independent evaluation of the project.

The agencies do not agree that amending our proposal to retain the waste exclusion but eliminate the primary purpose test is a better approach to defining "fill material." First, we believe that a definition that primarily focuses on the effect of the material on the aquatic resource as opposed to its purpose better fulfills the purposes of the CWA. Retaining a purpose test focused on waste is confusing and would interfere with the overall benefit of the effects based approach. Second, any similarity between the analysis that is required to implement the waste exclusion and the 404(b)(1) Guidelines does not address the fact that the program has experienced some confusion over how and when to apply the waste exclusion in the Corps' definition. Although only 2 cases were identified in the preamble, this issue has come up on numerous occasions in the context of the permit program. When it arises in the context of general permits, project-specific application of the 404(b)(1) Guidelines is not undertaken, contrary to the suggestion of the comment. We do not agree that the difficulties that have arisen suggest that the Corps is not able to properly implement the program.

3. Clarify or delete effluent limitations guidelines

One commenter questioned the need for the proposed exclusion of materials covered by effluent limitation guidelines or NPDES permits, asserting that EPA has never had significant difficulties with the fact that its long-standing definition of fill material does not include such an exception. Several other commenters sought clarification of the discussion regarding the exclusion. Those commenters voiced concern that the discussion in the Preamble could be construed to exclude any and all materials from which subsequent runoff would be subject to effluent limitation guidelines, such as leach pads and tailings piles. Another commenter argued that the effluent limitation guidelines cited in the Preamble did not support the assertion that EPA generally regulates solid waste materials of a homogeneous nature, because the referenced effluent limitation guidelines apply to process wastewater or mine drainage, not solid materials. As such, the commenter found the reference confusing. A different commenter suggested that the exclusion based on effluent limitations include a specific effective date for such standards to be in place, to avoid a due process violation by excluding materials that are not currently covered or expected to be so within a reasonable time. An explanation has been provided earlier in this Preamble regarding materials not covered under section 404 permitting requirements. The determining factors do not include a distinction of either homogeneity or heterogeneity of the materials.

Although the (e)(2) language of the exclusion in the final rule has been clarified and ambiguous language referring to effluent limitation guidelines

eliminated, EPA agrees that, where runoff constitutes stormwater, it would be covered under the section 402 program. One commentor recommended that **the proposed (e)(2) exclusion language include not only discharges expressly authorized by an NPDES permit or covered by an effluent limitation guideline or standard, but also discharges associated with activities covered by a pollution prevention program implemented in connection with a facility's NPDES permit or as part of a facility's overall program for compliance with effluent limitations guidelines and standards. As discussed, we have modified the exclusionary language in the final rule to remove any ambiguity regarding its scope.**

4. Explain effect on treatment of RCRA landfills

Comments generally centered around the idea that the implementation of the proposed rule would add a layer of regulation to those activities already regulated under the Resource Conservation and Recovery Act (RCRA). One comment focused on the proposed rule's failure to provide, in explicit language, exceptions for those activities regulated under RCRA, as compared to that which was provided for Section 402 activities, while another recommended that the exclusion also apply to infrastructure associated with solid waste landfills. That same commenter asserted that the government incorrectly concluded that the rule does not have any economic impact which would require the Agency to develop a written economic statement. They maintained that part of the economic impact would be shouldered by the Corps as the implementation of the proposed rule would require the Corps to assess environmental im-

pacts in an area not previously regulated by the Corps. These comments are fully addressed in the preamble to the final rule and in the discussion of the *RII* case.

5. Modify reference to coal mining overburden in the definition of "discharge of fill material"

A number of comments raised issues with respect to the proposal to include coal mining overburden in the definition of "discharge of fill material." Although one comment suggested that coal mining overburden and all other mining waste materials should be excluded from the definition of fill material, most of the comments argued that only referring to coal mining overburden was too narrow and misleading. They noted that this rule is intended to apply to coal mining as well as hard rock mining activities. These comments urged that the rationale behind the proposed rule as well as explicit statements in the April 2000 preamble that the agencies were not intending to change existing practice argued for broader language that more appropriately reflected the agencies' intentions. Suggested alternatives include "placement of coal mining overburden and coal refuse," "mining overburden and waste rock," "coal mining or other mining overburden," and "berms, or dams, associated with the sedimentation ponds." The thrust of these comments is that absent the inclusion of broader language in the rule, the implementation may continue to result in confusion and uncertainty for the regulated community. We have modified both the definition of "fill material" and "discharge of fill material" to make clear that this rule is not limited to coal mining. The definition of "fill material" includes "overburden from mining or other excavation

activities;" the "discharge of fill material" includes "placement of overburden, slurry, or tailings or similar mining-related materials."

6. Expand the unsuitable fill category to supplement the waste exclusion

Several commenters suggested that the 'unsuitable fill' protocol described in the preamble to the proposed rule be expanded for use in other situations involving discharges into waters of the United States, such as waste disposal operations.

As described, in the earlier section on unsuitable fill, the Corps and the EPA have abandoned further consideration the "unsuitable fill" protocol that was described in the preamble to the April 20, 2000 proposed rule. Instead, the final rule provides clearer more predictable guidance with respect to the types of materials that qualify as "fill material," and this has obviated the need for the "unsuitable fill" protocol. As such, there is no opportunity, and no need, to expand this category of prospective discharge materials.

7. Miscellaneous Suggestions and comments

a. Combine piling regulation in same section as new fill definition

Commenters requested that the definition of fill material and discharge of fill material clearly require the regulation of pilings and piling supported structures. One comment specifically referred to the regulation of "mothballed" ships used for entertainment. These comments expressed concern over the Corps' inconsistencies as they relate to the regulation of these discharges and objected to the removal

of the reference to piling regulations. One commenter suggested the reorganization of the Corps regulations for easy reference to both the regulations pertaining to the definition of fill and pilings regulations.

The Agencies disagree that a specific reference to pilings and piling supported structures is necessary in the definition of fill material. The Corps' regulations indicate that "placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material" (33 CFR 323.3(c)). However, this rulemaking is not a suitable forum for discussion regarding implementation of this regulation. The Corps does regard, as a matter of convenience and of logical consistency, the idea of combining these regulations as having significant merit. However, the final decision on implementing this suggestion will have to be deferred until such time as the Corps of Engineers publishes a consolidated version of its regulations. The Corps reserves the right to make all final decisions on the organization of regulations that it promulgates.

b. Create additional exemptions to compensate for the expansion in Corps jurisdiction

A few commenters suggested that one or more additional exemptions from regulation under section 404 of the CWA should be created in order to compensate for the expansion of jurisdiction that these commenters per-

ceived would result from the adoption of the proposed rule.

We do not believe that either the rule proposed on April 20, 2000, or today's final rule constitutes an expansion of jurisdiction under the CWA. These rules simply sort the universe of prospective discharges into those that are regulated as "fill material," and those that are regulated as "all other pollutants" under the Act. Even if the adoption of a prospective rule arguably did represent some expansion of jurisdiction, we do not agree that additional exemptions should be created to compensate for that expansion. We believe that the criteria applied to any administrative interpretation of CWA requirements, jurisdiction, and exemptions must relate exclusively to the intent of the law. As such, we believe that any consideration of the equity between the scope of CWA jurisdiction and those activities that are exempted is the exclusive province of the legislature.

c. Effect on existing permits

Several commenters questioned the effect of this proposed rule on previously issued Corps of Engineers permits, and they expressed the concern that new criteria associated with the adoption of a revised definition of "fill material" would be imposed retroactively to previously authorized activities, in effect invalidating previously issued permits.

Today's rule only addresses the definition of fill material and the adoption of this rule will have no effect on existing permits.

d. Effect of rule on treatment of stormwater

One commenter suggested that, in addition to subsection (e)(2) of the proposed rule (i.e., discharges covered by effluent limits and discharges covered by a section 402 NPDES permits do not require a section 404 permit), the definition should also explicitly exclude stormwater discharges that employ "approved best management practices in effect at the time of construction of the stormwater outfall," whether or not such discharges are covered under section 402 regulations. As discussed in earlier comment responses, two regulatory programs were established by the CWA serving distinct objectives and goals. Provided that construction activity mobilizes pollutants that impact the receiving water, this is activity that is subject to regulation under the section 402 NPDES program. This is clearly distinguishable from discharges of fill material that impacts a discernable disposal site by raising its bottom elevation or replacing waters of the U.S. with dry land subject to regulation under the section 404 program. However, any ambiguity caused by the language in the proposed rule regarding discharges subject to effluent guidelines or section 402 requirements has been removed by the deletion of this portion of the proposed rule's language.

e. Clarify when conversions, diversions, and waste treatment systems can be used to avoid jurisdiction

Several comments raised issues about practices described as "conversion" and "diversion" of waters of the US. One commenter described the first practice as converting waters into non-waters by impounding them for waste treatment, while the second practice

involves diverting a stream out of its channel, such that the newly created dry area is no longer jurisdictional and not subject to CWA regulation. One industry comment explained that the practice of diverting ephemeral and intermittent streams has been used by his company. Facilities and materials of various types are then placed in the former streambeds without being subject to CWA regulation because they are no longer waters of the U.S.

Two comments from environmental organizations suggested that these practices violated the letter and spirit of the CWA and that it should be made clear that such methods could not be used to avoid CWA jurisdiction. One of these two comments explained that the practice of diversion essentially involves turning a live stream into a "sterile concrete or earthen channel devoid of most or all of the aquatic life that existed previously." As such, the comment asserts that the practice destroys the natural structure and function of the stream ecosystem, and thus violates the CWA mandate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Moreover, this comment asserts that the practice of diversion violates both the designated uses and the antidegradation policy elements of the water quality standards. The commenter argued that removing waters from their stream banks is not consistent with maintaining the minimum standard that waters be fishable and swimmable, nor with the requirement that all existing designated uses must be maintained.

These comments are outside the scope of the rule since they address the scope of geographic jurisdic-

tion under the CWA and other requirements, whereas today's rule simply defines fill material.

f. Private appropriation of public waters

Two commenters expressed the view that the rule improperly allowed the private appropriation of public waters, for disposal of mining overburden and other waste, and construction of in-stream sediment ponds. They stated these waters are held in public trust and are designated for beneficial uses, one of which is not to be waste transport. They asserted that in-stream sediment ponds convert the stream segment upstream of the ponds into unauthorized "mixing zones" for treatment and dilution of mine-related pollutants and settling of sediment from contaminated stormwater runoff, in derogation of State and Federal water quality standards.

We do not believe today's rule improperly allows private appropriation of public waters. Section 404 of the CWA expressly authorizes issuance of permits to authorize placement of dredged or fill material and does not condition authority to issue such permits based upon whether the project proponent is a private entity. With regard to use of waters for waste transport and mixing zones, these involve issues related to implementation of State water quality standards under Section 303 of the CWA, and are outside the scope of this rule. We do note, however, that Section 404 permits are subject to certification by the State under Section 401 as to compliance with water quality standards, and if the State has such concerns it is free to deny 401 certification. Readers are also referred to the previous preamble discussion of anti-degradation issues for related issues.

g Consistency between definitions of discharge of dredged material and discharge of fill material

Several commenters indicated that there was a need for the rule to reconcile any inconsistencies between the definitions of "discharge of dredged material" and "discharge of fill material." One of these commenters requested additional examples be included in the list of examples of fill material at section 323.2(e)(1), to avoid any misunderstanding that other materials can also displace wetlands and waters. The commenter also expressed concern that the term "dry land" in section 323.2(e)(1)(i) might connote a limited intent of regulated activities as there are some activities that can physically displace wetlands and waters but may not necessarily result in dry land. They expressed support for an interpretation of the term "changing the bottom elevation of any portion of a water" in section 323.2(e)(1)(ii) that would include redeposits from mechanized land clearing.

We do not believe such a clarification in the rule is necessary since, as the commenter notes, the definition of fill material in today's rule embraces material that changes the bottom elevation of any portion of a water of the US. We do note that where redeposits associated with landclearing have the effect of fill, courts have found that a discharge of fill material has occurred. See, *Avoyelles*, supra; *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F. 3d 810 (9th Cir. 2001).

Two commenters believed the proposal was inconsistent with the CWA, as construed in recent case law, including *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir.

1998) (*NMA*); one of them also asserted that it was inconsistent with *United States v. Wilson,* 133 F.3d 251 (4th Cir. 1997). One reason given for inconsistency with *NMA* was that the court clarified that the reference in section 404 of the CWA to "*discharge* of dredged or fill materials" necessarily referred to the "addition" of material to the waters, and that "because incidental fallback represents a *net withdrawal*, not an addition of material, it cannot be a discharge." 145 F.3d 1404 (emphasis added). The commenter thus reasoned that excavation of a landfill cell, followed by the addition of a required two-foot thick liner results in a "net withdrawal" not an addition of material. The commenter also asserted that the Corps does not have CWA jurisdiction over "excavation" in wetlands, noting that excavation is governed only by section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, which extends only to waters subject to the ebb and flow of the tide or used or potentially used in interstate transport. This commenter also pointed to the LRI landfill, noting that the landfill cells were excavated in areas that contained isolated wetlands, that no excavated materials were placed back in any wetland areas on the site, and thus, that the Corps had no jurisdiction over the activity. Moreover, the commenter asserted the liner and other landfill infrastructure subsequently placed in the excavated area did not constitute a "net addition" of material, and that, regardless, the discharge site was no longer a "wetland," as a result of activities not within the jurisdiction of the Corps. Finally, the commenter noted that the solid waste itself was not jurisdictional material, because it was excluded from the definition of the "fill material."

The *NMA* decision addressed what constitutes a discharge of *dredged material*, not fill material, and thus is not germane to today's rulemaking. In addition, that decision turned on the interpretation of "addition" under the CWA, an issue not addressed by this rulemaking. Issues related to what constitutes non-regulable incidental fallback under the *NMA* decision have been addressed in a separate rulemaking addressing the definition of "discharge of dredged material." 66 FR 4550. Similarly, assertions by the commenter related to Rivers and Harbors Act jurisdiction and whether excavation activities alter wetlands so as to defeat CWA jurisdiction are also outside the scope of this rulemaking. Interested readers are referred to the relevant regulations at 33 CFR Part 329 with regard to Rivers and Harbors Act jurisdiction and to 33 CFR 328.3(b) and 40 CFR 230.3(t) with regard to what constitutes a "wetland." With regard to *US v. Wilson*, that decision addressed the scope of geographic jurisdiction of the CWA, and thus also is not germane to today's rulemaking which deals with the matters related to the definition of "fill material." Readers are referred to the preamble's previous discussion of *Solid Waste Agency of Northern Cook County* for additional information on CWA geographic jurisdiction and isolated wetlands.

Another commenter requested that we revise the definition of "discharge of fill material" to provide, consistent with the approach in the definition of "discharge of dredged material," that incidental or *de minimis* addition of fill material does not require authorization under Section 404. The commenter reasoned that under the previous "purpose-based" definition of "fill material," such a *de minimis* exception was unnecessary because, as a practical matter, a discharge for the purpose of filling a water of the

US was not likely to be *de minimis*. The commenter noted that an effects-based definition would encompass even *de minimis* discharges, because they would have the effect of raising the bottom elevation, even if only slightly. Accordingly, the commenter recommended including the following sentence under the definition of "discharge of fill material:"

> "Section 404 authorization is not required for any incidental addition of fill material that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section."

The *de minimis* concept that has been applied by the agencies in the context of discharges of dredged material relates fundamentally to determining when an "addition" of a pollutant occurs in a water of the U.S. Because dredged material originates from waters of the U.S., the question of what is an addition is particularly relevant in that context. The agencies have never applied this concept in the context of fill material, those questions arc outside the scope of the narrow, definitional issues proposed in this rulemaking , and we decline to address them in this final rule.

APPENDIX D

Kensington Project
Lower Slate Lake Tailings Impoundment: Habitat Creation and Mitigation Plan

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July 14, 2003

* * * * *

... averaging five inches fork length for all capture methods pooled, were at the extreme lower end of the anadromous Dolly Varden length distribution from another Southeast Alaska lake (Heiser 1966). Their weight was 17% less than that of anadromous Dolly Varden of comparable length. Their annual growth rate (length and weight) averaged 59% less than the rate for anadromous Dolly Varden of comparable ini-

tial length. Based on these comparisons, Lower Slate Lake and streams in the Slate Creek drainage offer limited fish habitat. This limited habitat is reflected in a non-diverse, sparsely populated, assemblage of small fish.

Several multi-season wildlife surveys were conducted during the late 1980's and early 1990's in the Slate Lakes area (e.g. Dames and Moore 1990, King 1991, Cedar Creek Assoc. 1991). The area is within the general distribution area of the Berners Bay moose population. The herd is estimated at near 100 animals. Sign near the shores of Upper and Lower Slate Lakes indicated some use by moose during summer months that may be limited by a lack of shrubs and by the narrow, incised topography that limits development of preferred riparian vegetation.

Evidence also suggested that Canada geese may use the lakes for nesting and brood rearing (Dames and Moore 1990), although a different report generalized that this species usually nests within 100 yards of the marine shoreline in the region (Cedar Creek Assoc. 1991). During June 1990, 105 Vancouver Canada geese were observed on Lower Slate Lake. Observations made during November of 2002 included abundant goose sign around Spectacle Lakes, significant but less goose sign at Upper Slate Lake, and minor goose sign at Lower Slate Lake (Icy Strait Environmental 2002).

The following waterbird species were observed during surveys conducted in 1990 and 1991 in Slate Creek Cove (King 1991): loon, grebe, goldeneye, merganser, gull, mallard, teal, wigeon, harlequin, bufflehead, Canada goose, scoter, murrelet, scaup, sandpiper, and guillemot. This list provides an indication of the variety of species that reside in the

immediate area, many of which could conceivably use the Lower Slate Lake impoundment.

Other observations near Slate Lakes include beaver cuttings, red squirrel calls, a boreal toad at Upper Slate Lake, no sign of snowshoe hare, and no bats observed in flight (Dames and Moore 1990, Cedar Creek Assoc. 1991). A lack of prey, including Sitka black-tailed deer, is suspected to....

APPENDIX E

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MEMORANDUM

To: Susan Hitchcock, COE

From: Ed Kline, Kline Environmental Research

CC: Rick Richins, RTR

Subject: Lower Slate Lake vs. Kensington tailings impoundment benthic productivity

Date: December 23, 2003

Rick Richins requested that I prepare this memo pertaining to benthic productivity of Lower Slate Lake relative to the proposed Lower Slate Lake tailings impoundment for the Kensington Project. Operational and storage capacity details were provided in a 11/03/03 memo from Eric Klepfer to Ron Rimelman. The memo below pertains only to benthic productivity and benthic acreage comparisons. This information has been provided to TetraTech and has been presented and discussed at meetings with EPA, USFS, and Alaska DNR.

As currently proposed, tailings would be under a water cover at depths ranging from 9 to 20 feet. The

perimeter of the impoundment would be submerged forest soil to a water depth of 9 feet where the fringe of the tailings deposit would begin. The tailings deposit would slope toward the center of the impoundment to a maximum water depth of 20 feet. Observations made in Lower Slate Lake revealed Dolly Varden redds that were restricted to <8 inches water depth during August 2003 (<1.5 feet during a high water event in October). Based on these observations, all tailings will be deeper than Dolly Varden spawning depths.

Areas of natural sediment and tailings were calculated relative to the depth of sunlight penetration and depth distributions of benthic invertebrates. For simplicity, substrate coverage areas are based on the area of overlying water surface. Actual substrate areas are greater since the impoundment slopes toward the center. By ignoring slope, the area of natural sediment coverage relative to tailings coverage is underrepresented since submerged natural sediment is near shore, where slopes are greater.

Based on sediment sampling conducted during June 2000 and August 2001, a variety of benthic invertebrate species exist at 13 feet depth whereas sediment is nearly devoid of benthic invertebrates at 49 feet. A diverse benthic invertebrate community ceases to exist somewhere between these depths. A common estimate of the limits of rooted plants and benthic invertebrates in lakes, based on 1% penetration of surface light, is 2x the depth where a Secchi disc is no longer visible. This equates to 26 feet in Lower Slate Lake and has been used in past memos and reports to delineate benthic productivity. However, more sophisticated light penetration profiles during August 2003 revealed that the depth of 1% light

penetration is only 13 feet. This finding is consistent with observations of rooted plants in Lower Slate Lake but, coincidentally, this is the depth where benthic invertebrate samples containing a variety of species had been collected. As such, 26 feet was retained as a conservative estimate of the maximum depth of a diverse benthic invertebrate population for this memo, consistent with past reports and memos. The maximum potential depth of benthic invertebrate colonization in the impoundment was assumed to be the same as in the existing lake.

Given the above data and assumptions, areas of potential rooted plant growth (0 to 13 feet) and benthic invertebrate colonization in natural sediment and tailings (0 to 26 feet) were calculated for the existing Lower Slate Lake and the tailings impoundment (Table 1).

Due to the increased size of the impoundment relative to the existing lake, the area of submerged natural sediment in the impoundment that receives sufficient sunlight for photosynthesis will be greater than in the existing lake. In addition, a larger area underlain by tailings will also provide substrate for aquatic plants. Studies conducted during operation will reveal if amendments will be required to accelerate plant colonization in tailings. It may be revealed that the productivity of tailings is sufficient and that amendments may result in overproduction of plants and seasonal anoxia (winterkill). The required depth to avoid winterkill will be refined through studies conducted in neighboring lakes during operation. For this memo it is assumed that 20 feet is sufficient to avoid winterkill given the stained water in the watershed and the resulting low productivity of the lakes.

Because the estimated depth limit of a diverse benthic invertebrate population in Lower Slate Lake is 26 feet and the maximum impoundment depth is 20 feet, the entire impoundment can potentially be colonized by benthic invertebrates. Because the area of productive submerged natural sediment in the impoundment is equal to that in the existing lake, even marginal colonization in tailings would result in a larger benthic population than in the existing lake. Based on extensive habitability testing already conducted, the entire impoundment will be extensively colonized by benthic invertebrates and will far exceed the existing community. The above information is summarized in Table 1 and Figures 1 through 4 of this memo.

The habitability testing was conducted using an *in situ* experiment in Auke Bay and standard EPA marine and freshwater sediment habitability testing under laboratory conditions. All of the testing involved the conservative comparison of habitability in tailings immediately after the milling process vs. natural sediment collected from freshwater and marine waterbodies, including Lynn Canal and Lower Slate Lake. The overwhelming conclusion from these experiments was that Kensington tailings are as habitable by benthic invertebrates as natural aquatic sediment. The most powerful experiment was in Auke Bay where over 100 different species colonized Kensington tailings in a matter of months. This complex community in tailings was indistinguishable from the community that colonized natural marine sediment based on univariate and multivariate statistical techniques.

The only notable exception to the habitability tests results was poor survival of a freshwater amphipod

species under laboratory conditions. The test methodology was overly conservative in that tailings were not first suspended in flow-through test water. Rather, the tailings, while saturated with process water, were placed in the bottom of the test chambers and water was slowly added on top of the tailings. After two volume turnovers, the burrowing amphipods were added. Good growth of surviving amphipods and differences in basic water chemistry of water overlying tailings relative to the Slate Lake sediment for the first 24 to 48 hours of the test suggest that interstitial, residual process water early in the test was the source of mortality. The test represented benthic conditions at the point of discharge during operation and is not relevant to the issue of recolonization after closure, although it is notable that a freshwater midge larvae thrived in tailings under the same conditions.

Given the above information and data from marine and lake tailings disposal operations in Canada, it would be extremely conservative to consider the possibility that tailings will not be colonized by benthic invertebrates. Nonetheless, the acreage of submerged natural sediment in the Kensington impoundment will be equal to the acreage of productive benthic substrate in the existing lake. Furthermore, all of the submerged natural sediment will be covered by ≤ 9 ft of water, so the area of natural substrate that could support rooted plants in the impoundment would exceed that in the existing lake by 5 acres. As such, the worst-case scenario provides mitigation in the form of increased benthic productivity.

Increased benthic productivity as mitigation is considerably greater under the more realistic scenario of

rapid or eventual benthic invertebrate colonization in tailings. The area of productive benthic substrate in Lower Slate Lake would increase from 11.3 acres to 55.6 acres, nearly a five-fold increase.

Table 1. Zonation of Lower Slate Lake and the tailings impoundment based on water surface area overlying bottom types. The tailings impoundment was sized so that the area of submerged natural sediment (11.3 ac) would equal the existing area of productive sediment in Lower Slate Lake

Bottom type	Lower Slate Lake acreage (natural sediment)	Tailings impoundment acreage		
		Natural sediment	Tailings	Impoundment total
rooter plants and benthic invertebrates	6.3	11.3	18.4	29.8
benthic invertebrates (deeper than and including rooted plants)	11.3	11.3	44.3	55.6
unproductive	9.0	0	0	0
total	20.3	11.3	44.3	55.6

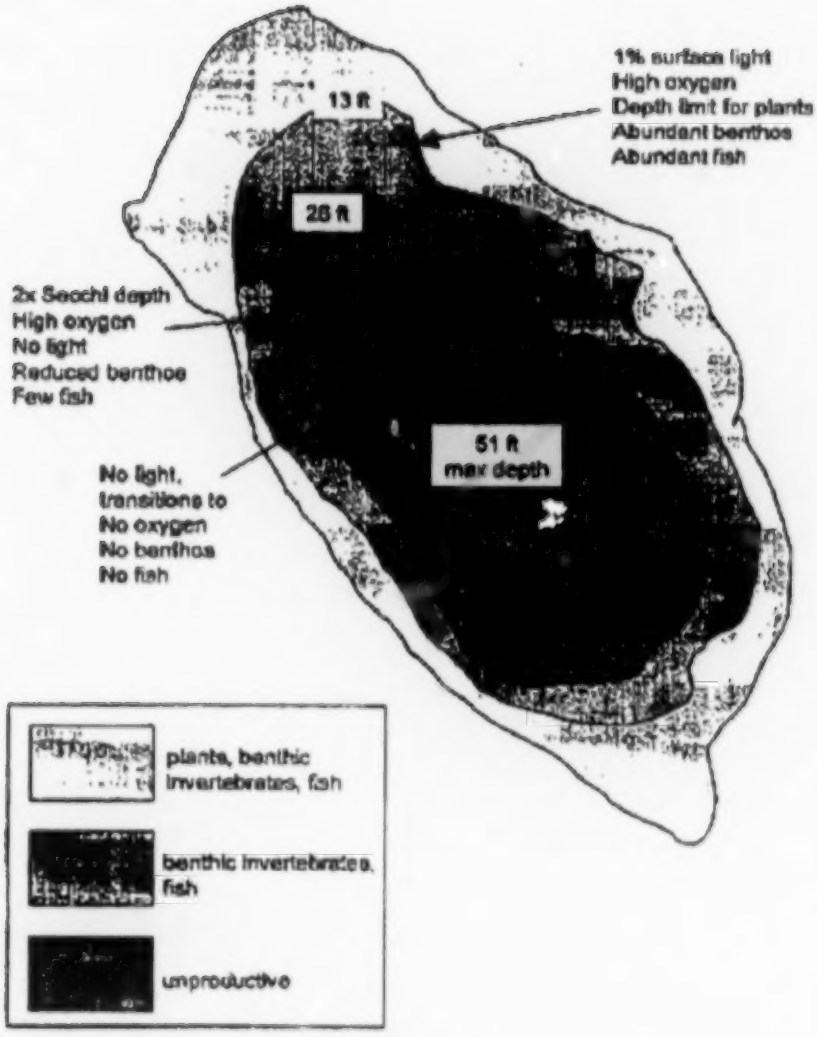

Figure 1. Zones of benthic productivity in Lower Slate Lake and measured conditions in the lake.

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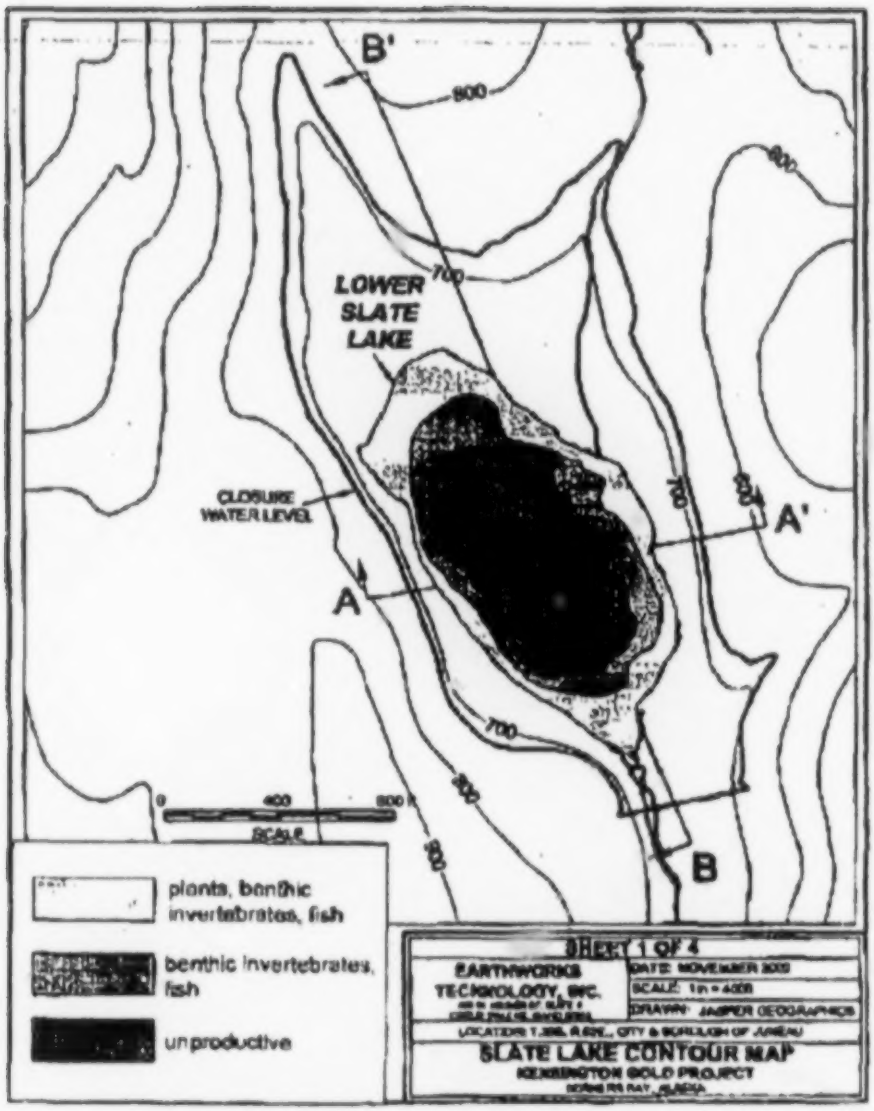

Figure 2. Zones of benthic productivity in Lower Slate Lake superimposed on a topographic map with the outline of the proposed final water level of the tailings impoundment.

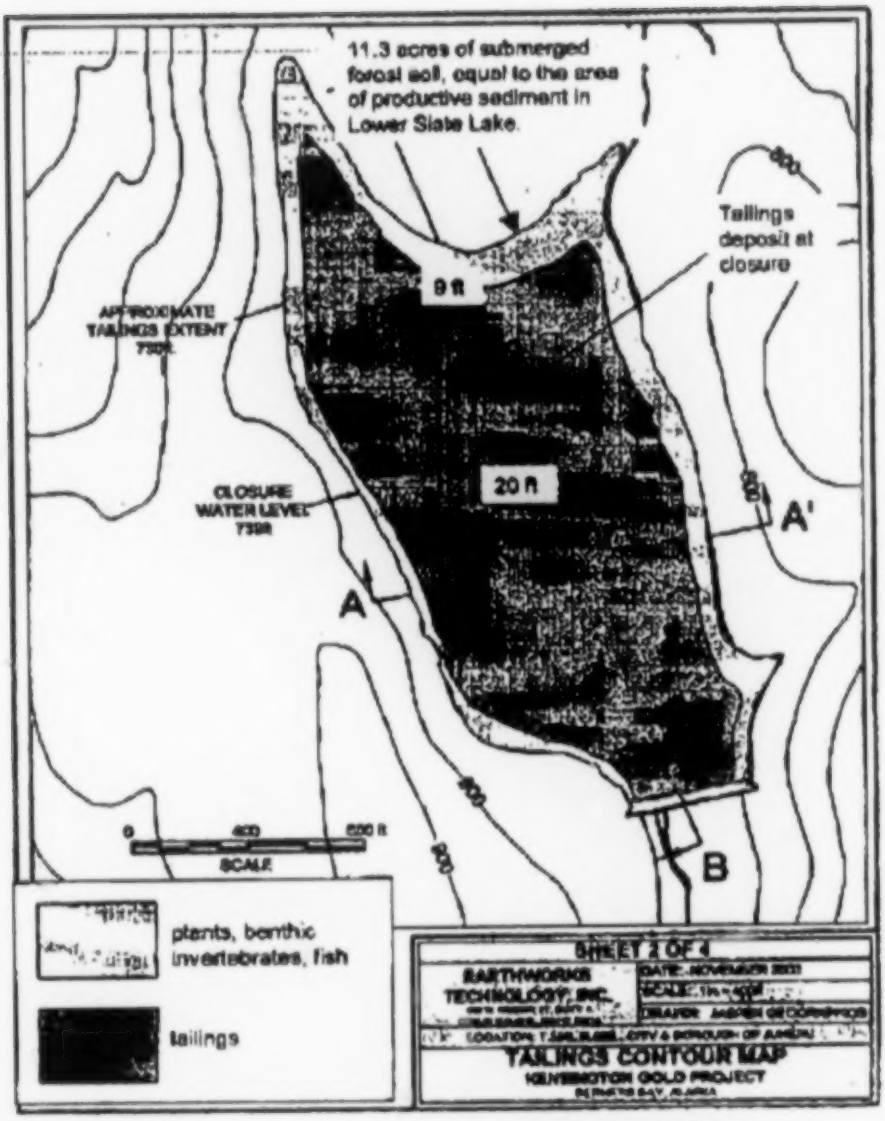

Figure 3. Zones of benthic productivity in the Lower Slate Lake tailings impoundment prior to recolonization of tailings.

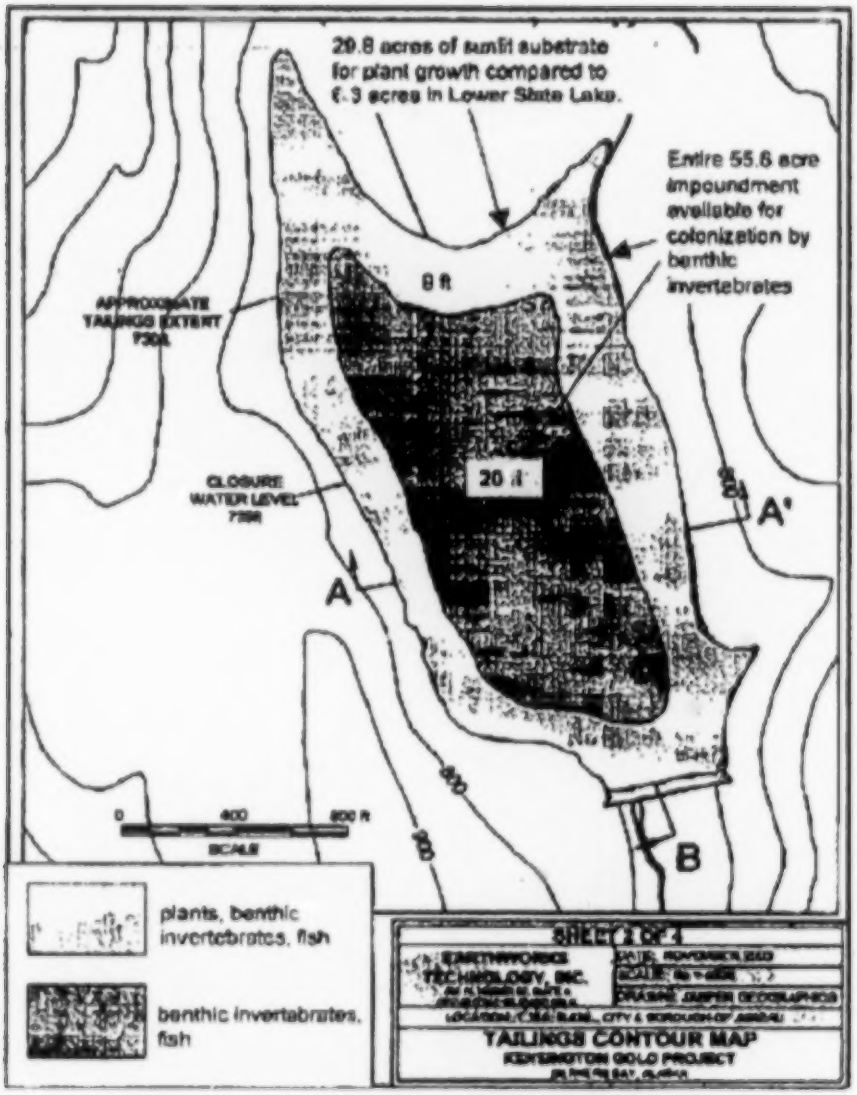

Figure 4. Zones of benthic productivity in the Lower Slate Lake tailings impoundment after recolonization of tailings.

APPENDIX F

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of Water

May 17, 2004

MEMORANDUM

SUBJECT: Clean Water Act Regulation of Mine Tailings

FROM: Diane Regas [s/Diane Regas]
Director, Office of Wetlands, Oceans and Watersheds

James A. Hanlon [s/James A. Hanlon]
Director, Office of Wastewater Management

Geoffrey H. Grubbs [s/Geoffrey H. Grubbs]
Director, Office of Science and Technology

TO: Randy Smith
Director, Office of Water, Region X

Thank you for your recent inquiry regarding the Clean Water Act (CWA) regulation of activities in waters of the United States associated with hard rock mining in Alaska and, more specifically, discharges of mine tailings from the proposed Kensington Mine. Your questions focus on the applicability of CWA sections 404 and 402 to the placement of mine tailings in impounded waters of the United States.

We have coordinated this matter with your staff in Region X and the Alaska Operations office, several offices within EPA Headquarters, and officials at the Headquarters and Alaska District offices of the Army Corps of Engineers (Corps). This memorandum serves to provide the clarification Region X and the Alaska District are seeking with regard to this issue, This memorandum describes a regulatory framework and how it applies to a general set of facts.[1] It does

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[1] While these questions have arisen in the context of a revised proposal being considered for the Kensington mine project, the regulatory approach outlined in this memorandum is generally applicable to other comparable mining proposals. The Kensington proposal, as we understand it, would involve the construction of a dam to impound the waters of Slate Creek and Lower Slate Lake and the placement of gold mine tailings into the impoundment created in Lower Slate Lake pursuant to an individual 404 permit and a subsequent discharge from the impoundment back to Slate Creek waters. The determination of which CWA permitting program applies to a particular discharge of mine tailings is fact-dependent and, in part, turns on the effect of the particular discharge on the receiving waterbody in question. This

[Footnote continued on next page]

not represent decisions about the suitability of a permit for any particular project.

EPA and the Corps agree that the discharge of fill material to construct the dam for a tailings impoundment as well as the discharge of the mine tailings into the impoundment is subject to permitting under CWA section 404, which governs the discharge of dredged or fill material. EPA and the Corps also agree that any discharge of pollutants from the impoundment to a downstream water (such as Slate Creek in the Kensington project) is subject to CWA Section 402, the National Pollutant Discharge Elimination System (NPDES) program. This discharge from the impoundment, like any discharge needing an NPDES permit, is subject to effluent limitations based on technology-based standards (e.g., any applicable effluent guidelines such as 40 C.F.R. Part 440) and any more stringent limits needed to comply with state water quality standards.

2002 Rulemaking Defining "Fill Material" and "Discharge of Fill Material"

Under section 404 of the CWA, the Corps (or an authorized State) issues permits for discharges of dredged or fill material into waters of the United States. Discharges of all other pollutants into waters

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[Footnote continued from previous page]

memorandum is specific to impoundments and thus our analysis today focuses solely on the discharge of mine tailings into impoundments designed to hold such materials. Any other type of proposed project, such as open water disposal of mine tailings or any other similar materials, would be subject to a different regulatory analysis.

of the U.S. are subject to permits issued by EPA (or authorized States) under the NPDES program. To bring greater clarity and consistency to how EPA and the Corps regulate discharges of pollutants, the agencies recently revised their regulatory definitions of "fill material" and "discharge of fill material." 67 Fed. Reg. 31129 (May 9, 2002). The regulations now define "fill material" as material placed in waters of the U.S. where the material has the effect of either replacing any portion of a water of the U.S. with dry land or changing the bottom elevation of any portion of the water. 67 Fed. Reg. 31130; *see also* 40 C.F.R. §232.2; 33 C.F.R. §323.2(e). Examples of fill material, as defined by the regulations, include overburden from mining and materials used to create any structure or infrastructure in waters of the United States. Similarly, the phrase "placement of overburden, slurry, tailings or similar mine-related materials" was added to the definition of "discharge of fill material" to provide further clarification as to the type of activities generally regulated under section 404. See 40 C.F.R. §232.2; 33 C.F.R. §323.2(f).

We believe that the text of the rule makes clear that mine tailings placed into impounded waters of the U.S., as proposed by the Kensington mine project, are regulated under section 404 of the CWA as a discharge of fill material, and that effluent discharged from the impoundment to a downstream water, such as Slate Creek is covered by section 402. Mine tailings placed into the proposed impoundment will have the immediate effect of filling the areas of water into which they are discharged and therefore fall within the scope of section 404. As a result, the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore

mining (see 40 C.F.R. Part 440, Subpart J), do not apply to the placement of tailings into the proposed impoundment. See 40 C.F.R. §122.3(b). This result is confirmed by the preamble to the rule which explained the dividing line between section 402 discharges and section 404 discharges by noting that EPA would continue to regulate under section 402 "discharges (such as suspended or settleable solids) [that] can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants." 67 Fed. Reg. 31135. Here, the effluent discharged from the impoundment into Slate Creek will contain pollutants in the form of suspended and settleable solids, materials that will have, at most, an incidental filling effect. The addition of those pollutants to the Creek from this impoundment associated with an industrial operation would therefore be subject to regulation under section 402.

In sum, under both the plain language of the rule and the Agencies' interpretation of the regulation in its preamble, the mine tailings that are to be placed into an impoundment are covered by section 404 and effluent discharges from the impoundment into a receiving water are subject to permitting under section 402.

The Waste Treatment Exclusion

In 1992, EPA and the Corps were approached to address CWA regulation of the Kensington project, as then proposed, and a related mining proposal, the A-J Mine. Under the approach articulated in the 1992 memorandum from then EPA Assistant Administrator LaJuana Wilcher to the Region's Water Director Charles Findley regarding the A-J and Kensington proposals, issuance of a section 404 permit

for the impoundment of waters for mine tailings would, under certain circumstances, create a waste treatment system that was excluded from the, regulatory definition of "waters of the United States." In those circumstances, neither a section 404 permit nor a section 402 permit would be required to discharge tailings into the treatment system. A section 402 permit would be needed for any discharge of pollutants from the treatment system into waters of the United States. The 1992 memorandum provided that, as part of the analysis required under the section 404(b)(1) Guidelines, the physical impacts of the discharge of mine tailings into the system also would be considered.

The 1992 memorandum, however, was developed to clarify the regulatory approach to discharges of mine tailings in light of the Corps' and EPA's then differing definitions of "fill material" and "discharge of fill material." Our current analysis of how the 2002 rulemaking applies to the permitting of discharges of mine tailings into impounded waters will help to ensure a more effective environmental review of any adverse impacts associated with these types of projects. The rulemaking did not, however, alter EPA's interpretation of the waste treatment exclusion contained in 40 C.F.R. §122.2. While the permitting framework described in this memorandum does not invoke the exclusion for the discharge of mine tailings to impounded waters, neither does it preclude its use for waste treatment systems or system components that meet the definition in 40 C.F.R. §122.2.

Applicability of State Water Quality Standards

You also have asked how water quality standards would apply to the permitting of this project

under section 404. The regulatory approach articulated in this memorandum does not alter the manner in which water quality standards currently apply under section 404 of the CWA or, in particular, how they would apply to the Kensington proposal.

With regard to the Kensington Mine project, we understand that the company's current proposal would result in a tailings pile behind the dam that is some 54 feet above the current water level in Slate Lake and, in the process, result in filling the entire Lake.[2] In addition to the analysis of the availability of upland alternatives, the Corps' environmental review of the project under the section 404(b)(1) Guidelines must specifically consider compliance with water quality standards and the chemical, physical, and biological impacts associated with the proposed conversion of waters to non-waters that are contemplated to result from the discharge of fill material. Before a section 404 permit may be issued, the Corps must conclude, among other determinations, that the proposed project would not cause or contribute to significant degradation after all practicable steps have been taken to avoid and minimize environmental impacts and to mitigate for remaining adverse aquatic impacts.

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[2] Additionally, we understand that there may be some water on top of the disposal site after the conclusion of the permitted activity. Any determination by the government to reassert CWA jurisdiction over this water would generally not occur until after site reclamation has been completed consistent with an approved mine reclamation plan.

In addition, under the Guidelines, "no discharge of dredged or fill material may be permitted if it causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard." 40 C.F.R. §230.10(b)(1). In circumstances like the proposed Kensington mine, the Guidelines do not require that the proposed discharges comply with water quality criteria within the impoundment since the impoundment is the "disposal site" proposed to be authorized to be filled under the Corps' section 404 permit. The regulations define "disposal site" as "that portion of the 'waters of the United States' where specific disposal activities are permitted and consist [sic] of the bottom surface area and any overlying volume of water." 40 C.F.R. §230.3(i).

In this particular case, because the entire lake is proposed to be within the permitted disposal site specified under section 404(a), the section 404(b)(1) Guidelines require the Corps to consider, during the permitting process, whether the discharge of fill material would cause or contribute to a violation of water quality criteria or impairment to designated uses in the adjacent waters of Slate Creek (i.e., waters outside the impoundment). The State, in making decisions with regard to water quality certification, determines whether the project would cause or contribute to a violation of water quality standards, at a minimum, in waters upstream or downstream (outside) of the disposal site, considering, among other factors, whether future discharges from the impoundment to downstream waters will meet

discharge limits that assure compliance with applicable downstream water quality standards.[3]

State water quality standards also include antidegradation policies consistent with 40 C.F.R. §131.12. EPA interprets section 131.12(a)(1) of the federal requirements for antidegradation policies to be satisfied with regard to fills in waters if the discharge will not result in "significant degradation" as defined under section 230.10(c) of the section 404(b)(1) Guidelines. See Water Quality Standards Handbook, 2d Ed. (U.S. EPA Aug. 1994), at 4-5. Accordingly, unless a state indicates otherwise, a discharge of fill material which complies with the "no significant degradation" requirement of the Guidelines would be considered also to satisfy the "existing uses" requirement of the state's antidegradation policy.

I appreciate the assistance you and your staff have provided on this matter. I trust that the information provided in this memorandum meets your needs. Should you have any additional questions, please contact me or have your staff contact John Meagher at 202-566-1353.

cc: Major General Strock
Director of Civil Works

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[3] States retain the authority to adopt use designations for waters that prohibit or substantially restrict discharges into certain waters, such as outstanding natural resource waters (see 40 C.F.R. § 131.12(b)(3)) and to protect those uses through the exercise of their certification authority.

APPENDIX G

KLINE
ENVIRONMENTAL
RESEARCH, LLC

1731 50th Street
Somerset, WI 54025
Phone: (715) 247-4466
Fax: (715-247-4608
E-mail: kline@pressenter.com

TECHNICAL MEMORANDUM

To: Rick Richins

From: Ed Kline

Subject: Time required for benthic recolonization in the Kensington tailings storage facility

Date: August 17, 2004

Summary

This technical memorandum provides information to supports the following conclusion:

> A diverse and abundant benthic invertebrate community will remain in the submerged natural sediment around the perimeter of the Kensington tailings storage facility (TSF) throughout the operation. The width of this colonized band of natural sediment will vary during operation, but will be present at closure to contribute to rapid colonization of tailings after deposition ceases, and rapid colonization of newly submerged sediment as the water is raised to the final closure eleva-

> tion. Airborne introduction and inflow from Upper Slate Lake will also contribute to colonization throughout the entire TSF during the first seasonal pulse of invertebrate recruitment after closure. A diverse and abundant benthic invertebrate community will be established ≤1 year after closure in the 11 acres of submerged natural sediment and ≤6 years after closure in the remainder of the TSF that will be underlain by tailings. As such, ≤1 year after closure, the TSF will have a larger area of productive lake bottom than currently exists and there will then be no constraints to reestablishing populations of fish, plants, and wildlife that will meet or exceed the diversity and productivity of the existing Lower Slate Lake community. Additional information on the method of discharge and rates of tailings consolidation after closure may allow the ≤6 year prediction pertaining to tailings to be reduced.

A variety of approaches were used to reach this conclusion. Each approach, when viewed in isolation, supports the conclusion. The weight of evidence from the combined approaches provides assurance that the conclusion is conservative. Habitability testing demonstrated that colonization of Kensington tailings will begin with the first seasonal pulse of invertebrate recruitment after closure, but that establishment of some species may be limited until the organic content of the surface layer of tailings increases through natural processes, or until dilute process water in the surface layer of tailings becomes further diluted by overlying lake water. Toxicity testing and chemical analyses have shown that Kensington process water is near the threshold of

toxicity for some species due to organic milling reagents and/or an imbalance of common ions. An abundance of invertebrates found during 2004 in metal-rich tailings in an impoundment that contained highly toxic concentrations of interstitial cyanide after closure in 1998 demonstrates that any potential lag in habitability due to low organic content or process water will be less than six years. All of the above studies support previous demonstrations that Kensington tailings have low metal concentrations, low metals bioavailability, and low reactivity.

* * * * *

... examples, recruitment was limited to airborne sources and/or initial productivity was dependent on the water column, yet benthic colonization was rapid.

It is this literature that supports the prediction that an invertebrate population will persist along the margin of the TSF during operation. This literature also allowed the conclusion to be drawn that the 11 acres of natural sediment will become colonized by a diverse and abundant invertebrate community ≤1 year after closure of the TSF. Given that the 11 acres will not be lacking in organic matter, the TSF will have a water link to a nearby lake, and much of the literature demonstrates dense and diverse invertebrate colonization after weeks or months in new reservoirs and ponds, the predicted ≤1 year return to productivity should be considered conservative. Finally, the opportunistic feeding habit of Dolly Varden eliminates the need for academic definitions on the specific meaning of "diverse and abundant invertebrate community". In short, the reclamation objectives will be met because numerous and varied benthic invertebrates will be available for Dolly Varden to feed on, in addition to sticklebacks which

are abundant and will naturally be introduced from Upper Slate Lake.

Research Recommendations

- Develop a prediction of the percent process water versus lake water that will comprise the interstitial water of the settled tailings after closure.
- Develop tailings consolidation curves for Kensington and Golden Cross for comparison of process water release rates after closure.
- Calculate the approximate area of submerged natural sediment at various points in time during operation through to closure, prior to submersion of the final 11 acres.
- Conduct invertebrate surveys in natural sediment and tailings during operation in the TSF. Use the results to refine the reclamation plan, with the expectation that the predicted time for colonization in tailings may decrease.

References

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ASci Corporation. 2000b. Results of 42-day Hyalella azteca habitability tests with tailing sample from Dawson Metallurgical Laboratories, Utah and lake sediment samples from Lower Slate Lake, Alaska.

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Blumenshine, SC, Y Vadeboncoeur, DM Lodge, KL Cottingham, SE Knight. 1997. Benthic-pelagic links: responses of benthos to water-column nutrient enrichment. J. N. Am. Benthol. Soc. 16:466-479.

APPENDIX H

STATE OF ALASKA/
Frank H. Murkowski, Governor
410 Willoughby Ave., Ste. 303
Juneau, AK 99801-1795
PHONE: (907) 465-5180
FAX: (907) 465-5177
http://www.state.ak.us/dec

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF WATER

RECEIVED
DEC 0 9 2004
GENPA - CO - R - E - JFO
Alaska District Corps of Engineers

December 6, 2004

John Leeds, III
Department of the Army
U.S. Army Engineer District, Alaska
Juneau Regulatory Field Office
8800 Glacier Highway, Suite 106
Juneau, Alaska 99801-8079

Re: Kensington Mine Section 404 Permit

Dear Mr. Leeds:

The Alaska Department of Environmental Conservation (DEC), in coordination with the State Large Mine Team, is considering the application from Coeur Alaska for a Clean Water Act (CWA) Section 404 permit to discharge mine tailings to the Lower Slate Lake disposal site. DEC is conducting this work as part of the State's authority to certify the permit under Section 401 of the CWA.

At this point in our analysis we have looked closely at the characteristics of the tailings and wanted to inform you of our findings and provide some preliminary thoughts about our CWA Section 401 certification. Our efforts have included internal review of available data and reports. We also contracted with Ecology and Environment, Inc. to review and summarize available data on both the potential toxicity and the acid generating potential of the mine tailings (see enclosure).

In general, we have concluded that available information suggests that the toxicity risks associated with the tailings will be low both during and after mining operations. A number of marine and freshwater tests show no toxic effects associated with the tailings. While one freshwater bioassay result suggests that the combination of tailings and undiluted residual milling reagents may have the potential to cause toxic effects, the generally low metals content of the tailings leads us to suspect that the milling reagents may be responsible for the observed effect. Another freshwater bioassay using a different organism found no statistical difference between the toxicity of the combination of tailings and undiluted residual milling reagents when compared to Lower Slate Lake sediments.

Despite some suggestion in the one test result that undiluted residual milling reagents have the potential to cause toxic effects, we note that there will always be substantial dilution of residual milling reagents in the disposal facility during actual operations. We expect to work with the U.S. Environmental Protection Agency in our certification of the CWA Section 402 permit to include permit limits that guard against the potential for toxic effects from

any residual milling reagent constituents of the discharge to Slate Creek.

As for post-closure re-colonization of the tailings by benthic organisms, our review suggests nothing to lead us to suspect that tailings toxicity would preclude or hinder re-colonization. To contend with the inevitable uncertainty about how long re-colonization will take, we are considering including in our certification of the CWA Section 404 permit contingency measures, such as adding organics to or capping deposited tails, in the event they are needed to ensure or speed re-colonization.

We can be most definitive about the acid-generating potential of the tailings. Results of a substantial number of tests performed on the acid generating potential of the tailings suggest that there is virtually no risk either during or after mining operations.

Finally, to guard against the potential for significant changes in tailings toxicity or acid generating potential over the course of mining operations, we expect to require as a condition of our certification periodic testing of tailings characteristics.

I hope you find this interim information useful. Please contact DEC's Project Manager, Pete McGee, at (907) 451-2101 if you have questions or if we can provide additional information or analysis.

Sincerely,

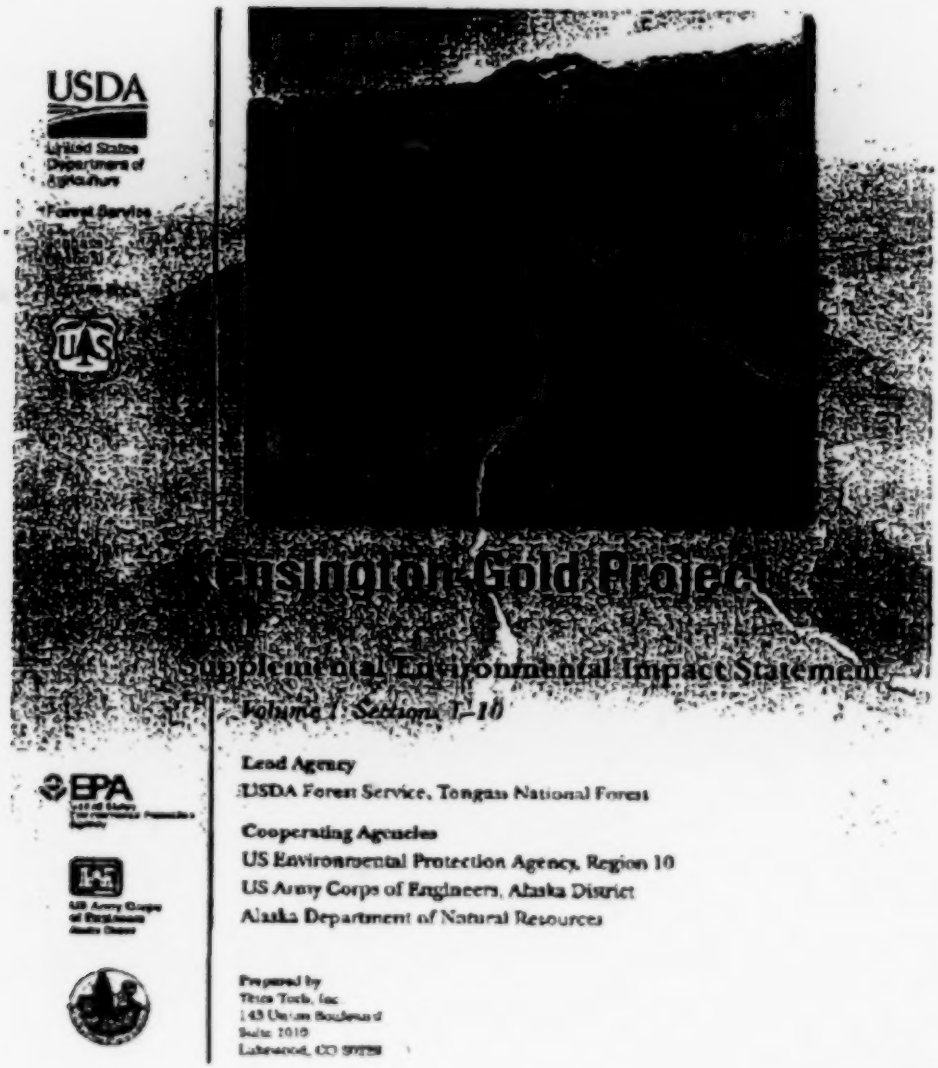
/s/Dan Easton

Dan Easton, Director
Division of Water

Enclosure

cc: Ed Fogels, State Project Manager
Pete McGee, DEC Project Manager

APPENDIX I



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Kensington Gold Project

Final

Supplemental Environmental Impact Statement

Volume 1 of 2
Sections 1–10

United States Department of Agriculture
Forest Service
Tongass National Forest
R10-MB-500a

December 2004

SECTION 1.0
PURPOSE AND NEED FOR THE PROPOSED ACTION

1.1 BACKGROUND

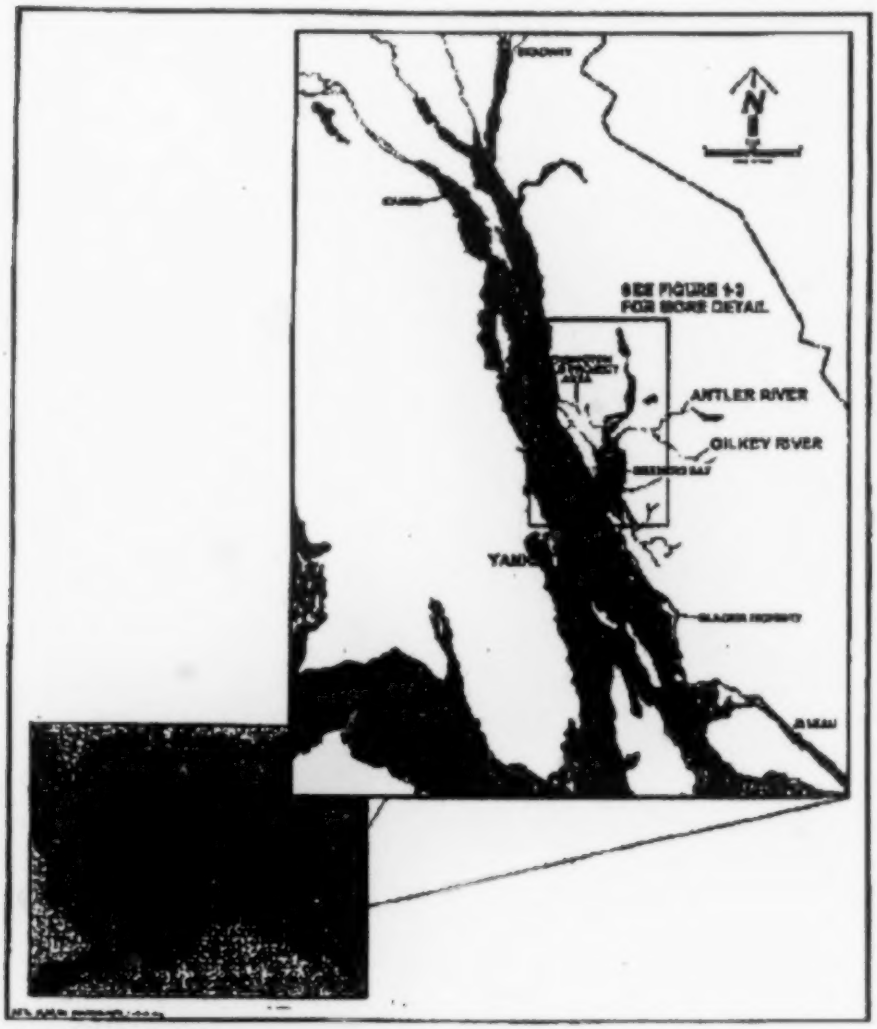
The Kensington Gold Project is a permitted underground gold mine approximately 45 miles north-northwest of Juneau, Alaska (Figure 1-1). Coeur Alaska, Inc. (Coeur), the project operator, maintains a wastewater treatment plant, including settling ponds, near the 850-foot portal in the vicinity of the Kensington Mine site. The settling ponds treat mine drainage and are authorized to discharge to Sherman Creek under a National Pollutant Discharge Elimination System (NPDES) permit. A waste rock pile resulting from exploration activities is in the same vicinity. A small personnel camp at Comet Beach houses workers conducting maintenance activities at the site. The mine received all permits required to begin construction and operations following publication of the 1997 *Kensington Gold Project Final Supplemental Environmental Impact Statement* (1997 SEIS) and issuance of a Record of Decision (ROD).

Coeur has not yet constructed the mine. A desire to improve efficiency and reduce the extent of disturbance of the approved project motivated Coeur to submit an Amended Plan of Operations (Amended Plan) to the U.S. Department of Agriculture, Forest Service, Tongass National Forest, Juneau Ranger District (Forest Service). The Amended Plan forms the basis for this Final SEIS.

This Final SETS represents the third time the Kensington Gold Project has undergone a review under the *National Environmental Policy Act* (NEPA). In 1992 the Final EIS was completed (1992 FEIS). The Kensington Venture, a joint venture between Coeur and Echo Bay Exploration Inc., initially proposed to develop the Kensington Gold Project. Their proposal, submitted to the Forest Service in 1990, described mining the Kensington deposit. The operations proposed would have used underground techniques to recover the ore, processed the ore on-site using flotation and cyanidation circuits, and disposed of the tailings in a tailings impoundment built in the Sherman Creek drainage. The impoundment would have been sized to accommodate 30 million tons of tailings. The proposal included discharging wastewater to Lynn Canal following treatment and shuttling employees to the mine site using helicopters. The operation would have used liquefied petroleum gas to fuel on-site generators. A marine terminal developed at Comet Beach in Lynn Canal would have handled supply deliveries and gold shipments. One of the alternatives not considered in detail in the 1992 FEIS involved tailings disposal in Slate Lakes. This was eliminated from further consideration in large part because of difficulties of and disturbance associated with transporting tailings from the mill in the Sherman Creek drainage. At the time, the Jualin claims were under separate ownership.

The Kensington Venture never obtained all the permits necessary to build the mine, and in 1995 Coeur became the sole stakeholder in the property. Coeur then submitted an Amended Plan of

Operations to the Forest Service in September 1995. Coeur's 1995 Plan of Operations included the same mining and tailings disposal scenario but proposed enhanced treatment of the tailings wastewater and a discharge to Sherman Creek rather than Lynn Canal. The proposal also included backfilling the cyanidation tailings and changing the fuel source from liquefied petroleum gas to diesel. The Forest Service published a Notice of Intent to prepare a supplemental environmental impact statement for the proposed changes, and scoping meetings were held in October 1995 to solicit public comments on the project.



Source: Forest Service, 1997a

FIGURE 1-1. GENERAL PROJECT AREA (APPROXIMATELY 45 MILES NORTHWEST OF JUNEAU)

In response to comments received during the scoping process and meetings with federal, state, and local agencies, Coeur again revised its Plan of Operations and resubmitted it to the Forest Service in June 1996. The 1996 plan called for the elimination of on-

site cyanidation in favor of shipping flotation concentrate off-site for gold recovery. The 1996 plan also proposed the construction of a dry tailings facility (DTF) on a "terrace area" between Sherman and Sweeny creeks and the backfilling of at least 25 percent of the tailings. Runoff from the DTF would be collected in a settling pond and discharged to Camp Creek (a small creek within the terrace area) under an NPDES permit.

The Forest Service held a second round of scoping meetings to solicit input on the 1996 plan. The Forest Service then completed the 1997 SEIS and identified Alternative D as the Selected Alternative in the 1997 ROD. Alternative D, the currently permitted project, consists of site access from Comet Beach, helicopter transport of employees, wastewater discharge to Sherman Creek, and construction of a DTF for tailings disposal.

Coeur submitted an Amended Plan of Operations for the Kensington Gold Project to the Forest Service in November 2001. The Amended Plan proposes a number of changes to the approved plan, such as changing the location of the milling facilities, tailings disposal, and site access and employing a different means of employee transportation. The operation would also mine a smaller portion of the ore body than that proposed under previous iterations. The Amended Plan proposes to use a dock to be built at Cascade Point on state tidelands adjacent to property held by Goldbelt Incorporated (Goldbelt), an Alaska Native corporation.

The Forest Service completed an EIS for the Cascade Point Access Road and issued a ROD in March 1998. The EIS and the ROD addressed access to Goldbelt's property across Forest Service lands but did not in-

clude an impact analysis for construction of a dock. Following Goldbelt's submittal of a *Clean Water Act* (CWA) Section 404 permit application for the facility in 1999, the U.S. Army Corps of Engineers (USACE) evaluated the potential effects of a dock at the site. The USACE denied the permit at the time, citing a lack of demonstrable need for the facility, as well as a number of environmental concerns.

The Forest Service directed the preparation of this Final SEIS by a third-party contractor, Tetra Tech, Inc. The U.S. Environmental Protection Agency (USEPA), USACE, and Alaska Department of Natural Resources (ADNR) participated as cooperating agencies with the Forest Service in preparing this Final SEIS (under Title 40 of the *Code of Federal Regulations* [CFR] Section 1501.6). The Forest Service requested that the National Marine Fisheries Service (NMFS) also participate as a cooperating agency although NMFS declined (Kurland, 2003). This Final SEIS was developed to evaluate the operator's proposed changes to the approved Plan of Operations for the mine on National Forest System lands and a dock on state tidelands at Slate Creek Cove. Other components include construction of a dock facility on state tidelands and private lands at Cascade Point. Approval for components not on National Forest System lands will be accomplished through other state and federal agencies with jurisdiction. This SEIS is intended to supplement the 1997 SEIS and 1992 FEIS. Information from the previous documents has been brought forward into this document to the extent practicable so the reader will not necessarily need to refer back to the previous analyses. According to requirements in the Council on Environmental Quality regulations for implementing NEPA (40 CFR Part 1500), this document

analyzes and dis...es the direct, indirect, and cumulative impacts associated with the proposed changes to the approved Plan of Operations.

The document is structured to present the project background and information on regulatory compliance in this section. Section 2.0 describes the Proposed Action along with alternatives to the Proposed Action. Section 3.0 describes the environment that would be affected by the Proposed Action or alternatives. Section 4.0 discusses the environmental consequences of the Proposed Action and alternatives.

The following appendices are included at the end of the document to provide additional information:

A. Water Quality Analysis

B. Essential Fish Habitat Assessment

C. Ecological Risk Assessment of Aqueous Tailings Disposal at the Kensington Gold Mine

D. Preliminary Reclamation Plan

E. Best Management Practices and Mitigation Measures

F. Old-Growth Habitat

G. Ground Water Quality

H. Migratory Birds: Birds of Conservation Concern and Priority Species

I. CBJ Notices of Decision

J. Biological Assessment/Biological Evaluation (BA/BE)

K. USEPA and State of Alaska Preferred Alternative and Environmentally Preferable Alternative Letters

L. Draft SEIS Comment Letters and Forest Service's Responses

1.2 PURPOSE AND NEED

The purpose of the Proposed Action is to consider certain changes to the 1998 approved Plan of Operations for the Kensington Gold Project regarding access, tailings disposal, and support facilities. The Proposed Action is needed to improve efficiency and reduce the area of surface disturbance.

The proposed changes are intended to provide more reliable transportation and access by improving worker safety during transit to the site and eliminating shipping delays related to weather and sea conditions at Comet Beach. The improved reliability of access would allow Coeur to reduce the amount of fuel storage, as well as inventories of materials and supplies.

The proposed changes are also intended to reduce the area of disturbance compared to the approved plan and to be more efficient in terms of operational cost and material handling. There would be no requirement to dewater the tailings, no trucking associated with hauling and placement, and two of the sand and gravel borrow pits would be eliminated.

1.3 PROPOSED ACTION

The Forest Service proposes to approve certain changes to an existing plan of operations based on an Amended Plan of Operations submitted by Coeur in November 2001. Under the currently approved plan, all mining operations would take place in the vicinity of the Kensington Mine. Under the Proposed Action, the mill and administrative facilities would be built in the Johnson Creek drainage in the vicinity of the

Jualin Mine, Supplies and ore concentrate would be shipped into and out of the facility by barge via a dock in Slate Creek Cove, in Berners Bay. A more selective mining plan would be followed. The ore processing methods used would be the same as those under the approved plan; however, access to the ore body would be through a 12,000-foot-long tunnel connecting the Jualin Mine to the Kensington Mine. Tailings would be disposed of in a tailings storage facility (TSF) built in Lower Slate Lake. Employee housing would be eliminated in favor of a daily crew shuttle boat service that would operate between Cascade Point and Slate Creek Cove. The existing road between Slate Creek Cove and the Jualin Mine would be upgraded to handle mine-related traffic. Treatment of the mine water and storage of waste rock would occur near the Kensington 850-foot portal in the Sherman Creek drainage. Figure 1-2 shows the location of the project area, including Sherman Creek and Berners Bay.

1.4 DECISIONS TO BE MADE

The Forest Supervisor of the Tongass National Forest is the responsible official for deciding whether to select the Proposed Action or another alternative for implementation. The Forest Supervisor will identify any additional mitigation measures and monitoring required for this project. His decision will be documented in a ROD, which will include the reasons for his decision based on the analyses presented in this Final SEIS. It should be noted that in the case of this document, the No Action Alternative is not a "no-build" alternative. Selection of the No Action Alternative as a result of this Final SEIS would deny the proposed changes to the currently approved operating plan but would allow the company to proceed

under the terms of the ROD for the 1997 SEIS and the approved operating plan. A No Action Alternative that considered the effects of no mining in the project area was evaluated in the 1992 FEIS.

The Director of the Office of Water and Watersheds for USEPA Region 10 will decide whether to issue a permit under Section 402 of the Clean Water Act, and what terms and conditions apply. USACE will also decide whether to issue permits under Section 404 of the Clean Water Act. Section 1.7 below provides additional information on agency responsibilities.

1.5 SCOPING AND PUBLIC INVOLVEMENT

The Notice of Intent to prepare this SEIS for the Kensington Gold Project was published in the *Federal Register* on September 13, 2002. The publication of the Notice of Intent started the scoping process, a public review and comment period required under NEPA (40 CFR 1501.7). The formal scoping comment period ended on October 15, 2002.

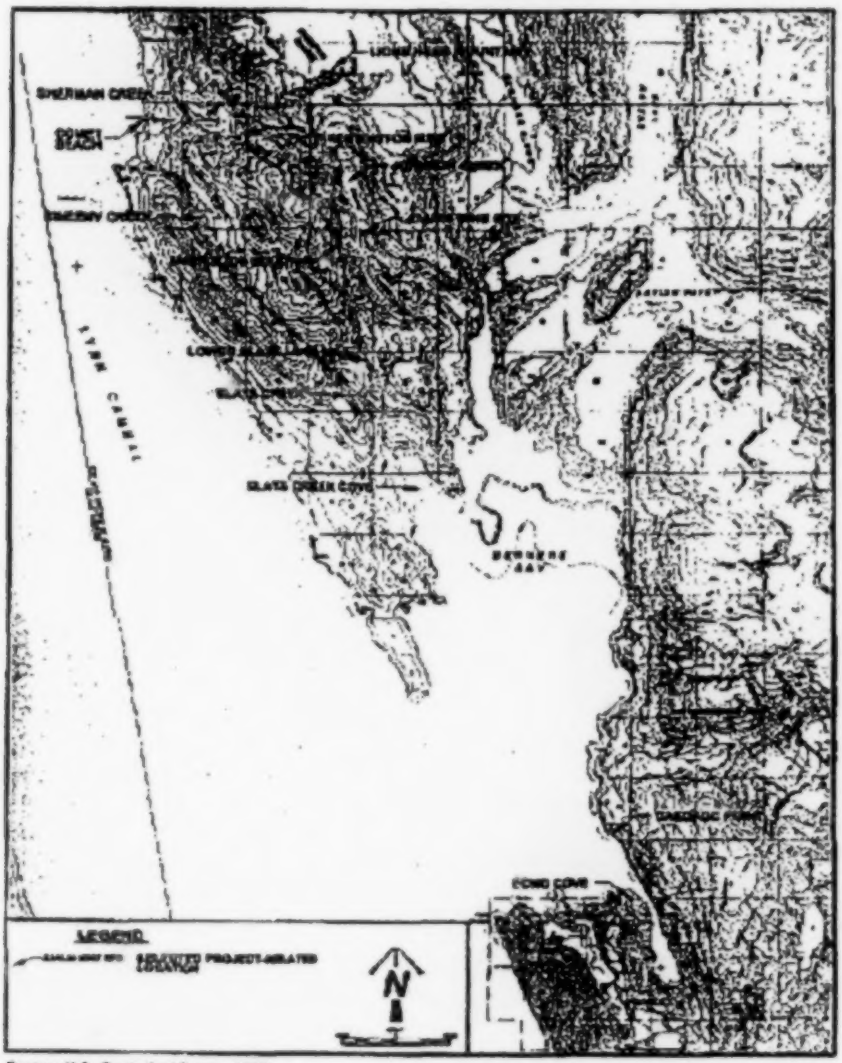
Scoping is a public participation process with several objectives:

- Provide the public, tribes, and regulatory agencies with a basic understanding of the Kensington Gold Project and the proposed changes to the mine's Amended Plan of Operations.
- Provide opportunities for people to ask questions, voice concerns, identify specific issues, and recommend options other than those proposed by the mine operator.
- Ensure that potentially significant issues from the public, tribes, and agencies are identified and

fully addressed during the course of the EIS process.

- Explain where people can find additional information about the project.

The Forest Service sent email notification of the Notice of Intent, as well as an electronic link to a copy of the scoping document, to approximately 40 agencies, tribes, organizations, and private individuals that had previously expressed interest in the project. The scoping document provided a brief history of the Kensington Gold Project dating back to 1990; numerous maps; discussions on the proposed action, agency involvement, permits and authorizations, and the scoping process; an SEIS preparation schedule; and information sources.



Source: U.S. Geological Survey, 1985

FIGURE 1-2. SPECIFIC PROJECT AREA

SECTION 2.0
DESCRIPTION OF PROPOSED ACTION AND OTHER ALTERNATIVES

This section describes the alternatives that form the basis for evaluating the current proposal for the Kensington Gold Project. Evaluating a reasonable range of alternatives ensures that significant im-

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pacts are avoided or mitigated to the extent possible. Various project components were evaluated as part of the alternatives analysis under the previous National Environmental Policy Act (NEPA) actions associated with the Kensington Gold Project. Alternatives in this Final Supplemental Environmental impact Statement (SEIS) target project components that are different from those previously proposed and that could address the significant issues identified during the scoping process.

The alternatives evaluated in this Final SEIS focus primarily on employee housing, transportation of personnel and material to and from the site, tailings disposal and management, and the location of wastewater discharges. Since publication of the 1992 Environmental Impact Statement (FEIS) and the 1997 SEIS, the operator has continued to collect baseline data on hydrology, water quality, aquatic life, and other key environmental resources in the vicinity of the Kensington Gold Project site. These data, as well as data collected by the U.S. fish and Wildlife Service (USFWS), have been used to evaluate the feasible project alternatives and mitigation measures.

The following discussions explain the development of alternatives, present a brief description of each alternative, and describe individual project components, including tailings disposal, water management, and transportation. Section 2 closes with a description of mitigation and monitoring, a tabular comparison of impacts, by alternative, on the various resource areas discussed in greater detail in sections 3 and 4, and identification of the Forest Service's environmentally preferable alternative.

ALTERNATIVES FOR THE KENSINGTON GOLD PROJECT

Alternative A (No Action): 1997 SEIS Alternative D: Dry tailings facility (DTF) with engineered berm; wastewater discharged to Sherman Creek and DTF drainage to Camp Creek; employee transportation by helicopter; personnel camp.

Alternative A1 (Reduced Mining Rate DTF): Similar to Alternative A with smaller production rate and smaller DTF.

Alternative B (Proposed Action): Wet tailings storage facility (TSF) in Lower Slate Lake; TSF wastewater discharged to Slate Creek and mine water discharged to Sherman Creek; employee transport by daily crew shuttle boat between marine terminals at Cascade Point and Slate Creek Cove; no personnel camp.

Alternative C (TSF Diversion/Modified Dock): Same as Alternative B except diversions to route Mid-Lake East Fork Slate Creek and overland flow around the TSF; employee transport by daily crew shuttle boat between marine terminals at Slate Creek Cove and Echo Cove; minimized subtidal footprint of the Slate Creek Cove marine terminal.

Alternative D (Modified TSF Design): Same as Alternative B except that Mid-Lake East Fork Slate Creek is diverted around the TSF via a pipeline, TSF water is treated by reverse osmosis prior to discharge into diversion pipeline, and a cover is installed over the tailings.

2.1 ISSUES AND ALTERNATIVE DEVELOPMENT

The formulation of alternatives to the Proposed Action is one of the most important components of the NEPA process. Significant issues identified during the scoping process drive the formulation of such alternatives. The alternatives can alter or reduce the magnitude of potential environmental impacts associated with the Proposed Action.

The alternatives developed for this Final SEIS reflect the significant issues identified during scoping, which consist of the following:

- Mine-related transportation would adversely affect users of, and resources in Berners Bay.
- Construction and operation of the tailings storage facility (TSF) and other mine facilities would adversely affect aquatic resources from slate and Johnson creeks to Slate Creek Cove and Berners Bay.
- The Lower Slate Lake TSF, docks, access road, and other mine facilities would adversely affect the scenic character of Berners Bay for recreationists.

Table 2-1 summarizes the development of alternatives, including the No Action Alternative (Alternative A), in response to the significant issues identified during scoping.

Table 2-1
Development of Alternatives in Response to Scoping Issues

Issues	Alternative A (No Action)	Alternative A1	Alternative B (Proposed Action)	Alternative C	Alternative D
Mine-related transportation would adversely affect users of, and resources in, Berners Bay	None of the project facilities would be located in the Berners Bay watershed or viewshed. Twelve round trips by helicopter weekly across mouth of Berners Bay.	None of the project facilities would be located in the Berners Bay watershed or viewshed Twelve round trips by helicopter weekly across mouth of Berners Bay	Crew shuttle boat between Cascade Point and Slate Creek Cove to transport workers, barges would deliver supplies to Slate Creek Cove	Crew shuttle boat between Echo Cove and Slate Creek Cove to transport workers, barges would deliver supplies to Slate Creek Cove.	Crew shuttle boat between Cascade Point and Slate Creek Cove to transport workers; barges would deliver supplies to Slate Creek Cove
Construction and operation of the TSF and other mine facilities would adversely affect aquatic resources from Slate and Johnson creeks to Slate Creek Cove and Berners Bay.	None of the project facilities would be located in the Slate Creek, Johnson Creek, or Berners Bay watersheds or viewsheds.	None of the project facilities would be located in the Slate Creek, Johnson Creek, or Berners Bay watersheds or viewsheds.	TSF constructed in Lower Slate Lake; discharge to East Fork Slate Creek; infiltration gallery in Johnson Creek, marine terminals in Slate Creek Cove and at Cascade Point	TSF diversions would limit volume of water contracting tailings; Echo Cove marine facility would avoid herring spawning habitat.	Treatment of the TSF effluent would further protect downstream surface water quality and aquatic life Tailings would be capped if necessary to prevent potential adverse effects on benthic organisms or fish in Lower Slate Lake.
The Lower Slate Lake TSF, docks, access road, and other mine facilities would adversely affect the scenic character of Berners Bay for recreationists	None of the project facilities would be located in the Berners Bay watershed or viewshed Twelve round trips by helicopter weekly across mouth of Berners Bay.	None of the project facilities would be located in the Berners Bay watershed or viewshed Twelve round trips by helicopter weekly across mouth of Berners Bay	Dock facilities would be located at Cascade Point and Slate Creek Cove.	Footprint of Slate Creek Cove marine terminal would be reduced in size; crew shuttle dock would be placed in Echo Cove north of existing boat ramp, eliminating fill at Cascade Point	Dock facilities located at Cascade Point and slate Creek Cove

2.2 OVERVIEW OF PROJECT ALTERNATIVES

This section introduces the four alternatives for the Kensington Gold Project. Section 2.3 provides a detailed discussion of each alternative by project component. Table 2-2 provides a comparison of alternatives based on the number of acres affected and presents the total acreage of disturbance compared to the disturbance on National Forest System lands. Table 2-3 provides a comparison of the size of various

project components among alternatives. Figure 2-1 depicts the overall project location for all alternatives and provides insets that correspond to Figures 2-2 through 2-12. Figure 2-2 shows the facilities that would be constructed under Alternative A. Figure 2-3 depicts the facilities that would be built under Alternative A1. Figures 2-4 through 2-8 show the facilities that would be constructed under Alternative B. Figures 2-4, 2-5, 2-9, 2-10, and 2-11 apply to Alternative C, and Figures 2-4, 2-5, 2-7, 2-8, and 2-12 apply to Alternative D.

Most of the activities conducted under the Kensington Gold Project would occur on federal lands managed by the Forest Service. There are, however, some parcels of private land in the area, which are identified in the figures. The State of Alaska owns the land below the mean high tide line, which is also indicated in the figures. Figure 2-1 further identifies state-selected lands under the National Forest Community Grant provision of the Alaska Statehood Act.

2.2.1 Alternative A: No Action Alternative

The No Action Alternative functions as the baseline against which the effects of other alternatives are compared. In NEPA analyses, the No Action Alternative typically represents a "no build" alternative or maintaining the status quo. Because this is an SEIS, the No Action Alternative reflects a previous action, which in this case is the project identified in the Record of Decision (ROD) issued for the 1997 SEIS. Alternative A corresponds to the 1997 SEIS's Alternative D, which includes underground crushing of ore with aboveground grinding and flotation. Flotation concentrate would be shipped to a processing facility off-site (most likely in Canada or Asia), and

the on-site cyanidation process proposed in 1992 would be eliminated. Employees would be housed on-site and transported to the site by helicopter. Supplies, including fuel, would be delivered to a marine terminal on Comet Beach. Approximately 25 percent of the tailings would be backfilled into the mine. The remaining tailings would be dewatered before being placed in the thy tailings facility (DTF). The DTF would have the design capacity to hold 20 million tons of tailings and would include an engineered berm around each cell of the facility to enhance stability. Road and DTF construction would require the development of sand and gravel and till borrow areas. The production rate would be 4,000 tons of ore per day and 400 tons of waste rock per day. The waste rock would be used in the construction of the DTF.

Table 2-2
Comparison of Alternatives by Area

Disturbance by Alternative (in acres)	Alternative A	Alternative A1	Alternative B	Alternative C	Alternative D
Existing disturbances (roads, facilities)	23 (18.4)	23 (18.4)	55.2 (37.4)	55.2 (37.4)	55.2 (37.4)
Maximum additional disturbance during operations	245 (229.3)	164 (148.3)	140.3 (119.8)	160 3 (139.8)	142.2 (121.7)
Total surface disturbance during operations	268 (247.7)	187 (166.7)	195.5 (157.2)	215.5 (177.2)	197.4 (159.1)

Note: Disturbances on National forest System lands are presented in parentheses

Table 2-3
Size of Selected Project Components (in acres)

	Alternative A	Alternative A1	Alternative B	Alternative C	Alternative D
Process Area	34.2	34.2	17.2	17.2	17 2
Marine Facilities	4.4	4.4	6	6	6
Explosives Magazine	2 9	2 9	_[a]	_[a]	_[a]
Fuel Storage	0 3	0.3	_[b]	_[b]	_[b]
Access Roads	22.8	22.8	28.9	28.9	28.9
Tailings Facility	113.4	50[c]	86.1[d]	86 1[d]	86 1[d]
Stormwater Detention/Sediment Ponds	7.6	7.6	_[e]	_[e]	_[e]
Laydown Area	0.8	0.8	5	5	5
Borrow Site(s)	54 7	36 6	8.4	8 4	8 4
Topsoil (Growth Media) Stockpile	9 3	9 3	1 6	1 6	1.6
Personnel Camp	5	5	NA	NA	NA
Batch Plant	1.3	1.3	NA	NA	NA
Mine water treatment ponds	6	6	6	6	6
Waste Rock Storage	Temporary	Temporary	36.3	36 3	36 3
Upper Portals	6	6	_[f]	_[f]	_[f]
Diversions and Treatment	_[g]	_[g]	_[e]	8 8	1.9
Inundation (during operations only)	NA	NA	NA	11.2	NA
Total Disturbance	**268.6**	**187.1**	**195.5**	**215.5**	**197.4**

[a] Located underground.

[b] Isotainer storage included in laydown area, process area, and marine facility acreages.

[c] Figure includes 33-acre DTF, 6-acre berm, and 10-acre staging area.

[d] Figure includes pipeline access road and cutoff road.

[e] Figure is included in the process area acreage.

[f] Not required because o Jualin access tunnel.

[g] figure included in DTF acreage.

NA = Not applicable.

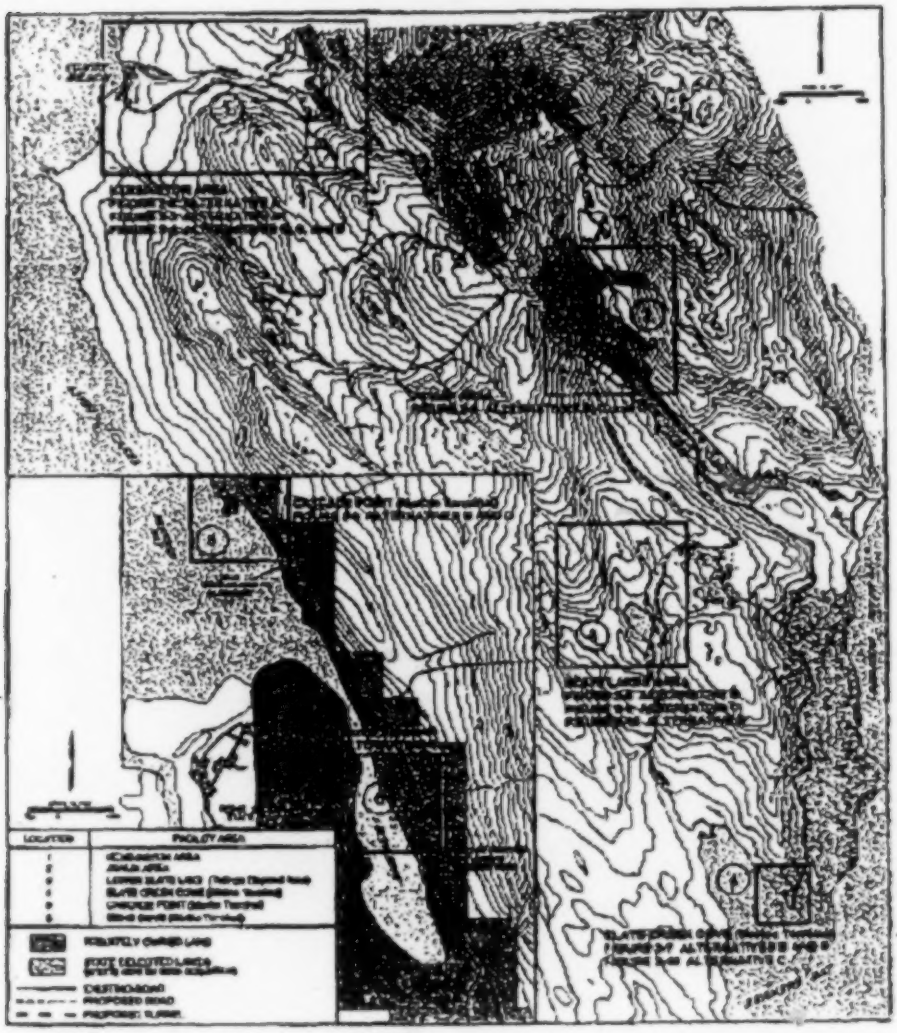

FIGURE 2-1. OVERALL LOCATION OF FACILITIES

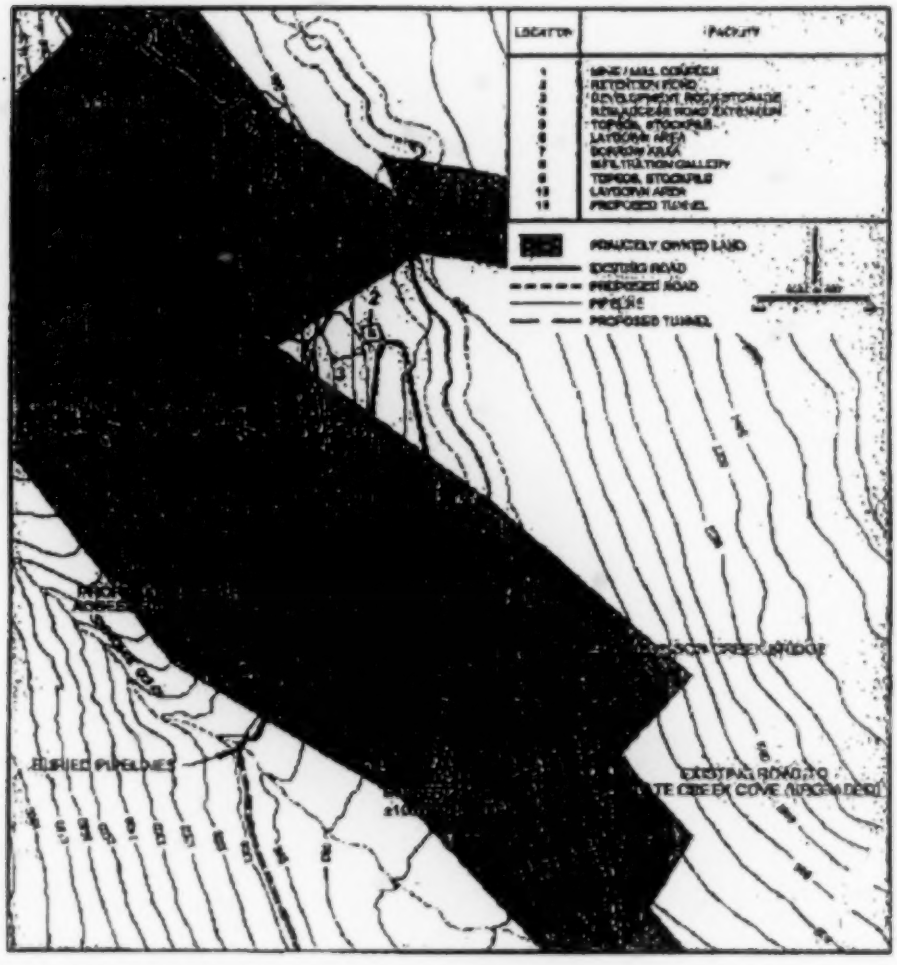

FIGURE 2-6. ALTERNATIVES B, C, AND D, JUALIN PROCESS AREA

2.2.2 Alternative A1: Reduced Mining Rate DTF

Alternative A1 represents one possible development scenario if the No Action Alternative was selected under current economic conditions. It is included to provide a mechanism for comparing all alternatives under a similar development scenario. Because Alternative A represents an approved Plan of Operations, the limited mining scenario under Alter-

native A1 could not be imposed on the company if the No Action Alternative was selected.

Alternative A1 would result in 4.5 million tons of tailings being placed in the DTF, assuming that 40 percent of the tailings would be backfilled. As described under the selected alternative in the 1997 ROD and as Alternative A in this analysis, the DTF would be constructed in three phases, each of which would use a separate cell within the DTF footprint. The size of the DTF under Alternative A1 is assumed to be the same as that proposed for the first cell under Alternative A (40 acres, including 6 acres for the structural berm). The analysis assumes a disturbance footprint of 50 acres during development of the DTF to allow room for staging of the dewatering operations and material stockpiles. This staging would have occurred within the full DTF footprint under Alternative A. The reduced mining rate presented under Alternative A1 would produce very limited amounts of waste rock. Because waste rock would not be available for use in DTF construction under Alternative A1, the impact analysis assumes that the same number of acres of sand and gravel borrow area as that under Alternative A would be required. The analysis also assumes that about half of the coarse and fine till borrow area would need to be developed to support construction of a smaller DTF. Other aspects of Alternative A1, including transportation of employees and materials, would be the same as those described under Alternative A. The life of the operation would be reduced to 10 years following 2 years of construction.

2.2.3 Alternative B: Proposed Action

Alternative B reflects a number of changes to the mine plan associated with the No Action Alternative.

These changes include constructing an underwater TSF within Lower Slate Lake, relocating milling operations to the Johnson Creek drainage, and eliminating the personnel camp. The operation would mine a smaller amount of ore with a higher average gold concentration compared with that proposed under Alternative A. Alternative B would include the development of a tunnel to connect the Kensington and Jualin areas of the mine. Access to the site would be from marine terminals built in Slate Creek Cove and at Cascade Point. A daily crew shuttle boat service would transport employees to and from the project site. The TSF would be sized to accommodate the disposal of 4.5 million tons of tailings. Borrow areas would need to be developed for construction of the TSF dam and roads. The production rate would be approximately 2,000 tons of ore per day. This alternative includes recycling water from the TSF to the mill circuit. Alternative B would require upgrading the 5-mile-long access road, constructing a 3.5-mile pipeline access road, and constructing a 1-mile cutoff road connecting the other two roads.

2.2.4 Alternative C: Dock Location and Design / Diversion

Alternative C would include a dock in Echo Cove, approximately 0.75 mile north of the existing Echo Cove boat ramp. Mine workers would use this dock to reach the crew shuttle that would deliver them to the dock at Slate Creek Cove. The landing craft ramp at the Slate Creek Cove marine terminal would be eliminated, minimizing the amount of fill in the intertidal areas. Alternative C would not include recycling water from the TSF and the mill circuit. The "no recycle" aspect was included in Alternative C

at the request of the operator to address the possibility that the operator might be granted an exemption from the regulatory requirement at 40 CFR Part 440 that process water must be recycled. This alternative would also include diversion channels to direct the flow from Mid-Lake East Fork Slate Creek and overland runoff from undisturbed areas around the TSF. The diversions would require a dam on Upper Slate Lake to maintain water levels in the diversion sufficient to reach the spillway at the TSF dam. The diversion would discharge to a spillway at the top of the TSF dam. The purpose of the diversion, would be to minimize the volume of fresh water in contact with the tailings. The remaining project components, including the production rate of 2,000 tons per day of ore and the access tunnel, would be the same as those under Alternative B.

2.2.5 Alternative D: TSF Water Treatment and Pipeline Diversion

Alternative D includes a modified TSF design. A dam would be constructed in Mid-Lake East Fork Slate Creek, and it would gravity-feed a diversion pipeline. TSF water would be pumped to a reverse osmosis treatment system. The treatment plant effluent would discharge into the diversion pipeline, which would flow to East Fork Slate Creek below the TSF dam. Once tailings disposal was complete, the tailings would be capped with native material unless the operator can demonstrate that uncovered tailings would not cause toxicity throughout Lower Slate Lake after closure. The remaining components would be same as those of Alternative B.

2.3 PROJECT COMPONENTS STUDIED IN DETAIL

2.3.1 Project Location / Duration

Figure 2-1 shows the location of project facilities, which would be built on National Forest System lands as well as private land (dark shading). Under Alternative A, the facilities would be contained within watersheds draining to Lynn Canal. The process area would be near the Kensington 850-foot portal and would consist of the mill, warehouse buildings, maintenance shop, administrative offices, and laboratory. The personnel camp would be near the wastewater treatment plant, downslope of the process area. Under Alternatives B, C, and D, portions of the operation (waste rock disposal and wastewater treatment of the mine drainage) would remain within the Sherman Creek drainage; however, facilities would also be built in the Johnson Creek and Slate Creek drainages, within the Bailers Bay watershed. Under Alternatives B, C, and D, the facilities mentioned above would be moved to an area above the historic Jualin Mine (Figure 2-5) consisting mostly of patented mining claims (private land). The personnel camp would be eliminated.

Under Alternative A, the active life of the project would be at least 12 years based on the existing reserve, following a 2-year construction period. Alternative A1 would have an active life of 10 years following a 2-year construction period. Mining operations lasting 10 years are projected under Alternatives B, C, and D, following an 18-month construction period.

2.3.2 Mining Methods

The proposed mining methods are similar to those presented in the 1997 Approved Plan of Operations. The following discussion provides a brief summary of mining methods based on details provided in the 1992 FEIS. The reader is referred to pages 2-5 through 2-7 of that document for additional details.

Under Alternatives A and Al, the ore body would be accessed by the existing tunnel at the Kensington 850 portal. Under Alternatives B, C, and D, the Jualin tunnel would be used as the primary access for workers and materials into the mine, as well as ore haulage between the mine and mill. The Jualin tunnel would be 18 feet wide by 15 feet high to accommodate 40-ton haul trucks. On the Jualin side, the portal would be near the mill at an elevation of 1,050 feet. From the portal, it would slope downward at a grade of 1.5 percent for 5,000 feet toward the existing Kensington tunnel, which it would intersect at an elevation of 932 feet. The tunnel would be driven from both sides to reduce the duration of the preproduction development period and to eliminate the need for a ventilation raise to the surface. The estimated schedule for completing the tunnel is about 150 days.

The Kensington ore body consists of a dense pattern of quartz veins and veinlets that extend from the surface to a depth of approximately 3,000 feet. The ore zone averages approximately 60 feet wide but ranges in width from 22 feet to more than 165 feet. The ore body is irregular in shape and erratic in the distribution of gold content. Coeur selected a mining method called the long-hole, open-stope technique on the basis of a number of factors, such as the spatial

and physical characteristics of the deposit, economics, and environmental considerations.

The long-hole, open-stope technique is employed in situations where ore occurs in wide and steeply dipping vein deposits. Mining would progress throughout the ore body as dictated by mine design, stope size, backfilling sequence, and other key elements that maximize extraction of the mineral resource. The long-hole, open-stope method allows for flexibility in handling irregular ore body widths and allows efficient removal of ore. It also allows safe working conditions while using a minimal workforce. Figures 2-13 and 2-14 depict the extent of the mine workings under Alternatives A1 , B, C, and D in relation to the ground surface and surface water drainages, respectively.

The operation under all the alternatives would mine the Kensington ore body. Alternative A proposes to process ore at a rate of 4,000 tons per day (tpd) and produce approximately 26 million tons of tailings over the life of the mine. The DTF would be sized to hold a maximum of 20 million tons, and 25 percent of the tailings would be backfilled. Under Alternatives A1, B, C, and D, a smaller portion of the same ore body would be mined at a rate of 2,000 tpd. The 2,000-tpd operation would target smaller quantities of higher-grade ore (ore with a higher gold content) than the operation proposed under Alternative A. Operations under Alternative A1, B, C, or D would produce a total of 7.5 million tons of tailings over the life of the mine: 4.5 million tons (60 percent) would be disposed of in the TSF (or the DTF in the case of Alternative A1), and 3 million tons (40 percent) would be backfilled.

2.3.3 Waste Rock Disposal

Waste rock is material encountered during the mining process that has a gold content less than that economically recoverable. During operations, waste rock would be hauled to the surface for storage, use, or disposal.

Under Alternative A, waste rock would be used as foundation, drainage, and berm material in construction of the DTF. A 15-acre temporary stockpile would be located near the mine opening for the first 3 to 4 years while the DTF was being developed. Once the DTF became active, the demand for waste rock would essentially equal production; that is, all waste rock would eventually be used in the DTF. Section 2.3.3 of the 1997 SEIS provides a more detailed discussion of waste rock management under Alternative A. Very little waste rock would be produced under Alternative A1.

Under Alternatives B, C, and D, most of the waste rock would be generated in the process of developing the access tunnel between the Kensington and Jualin portals. This tunnel would not be developed under Alternative A or A1. The waste rock would be hauled by truck to a 31.5-acre permanent disposal site near the Kensington 850-foot portal. There would also be capacity to store approximately 500,000 tons of waste rock on 4.8 acres in the vicinity of the process area at Jualin. Under all alternatives, waste rock could also be placed underground as part of the backfill process.

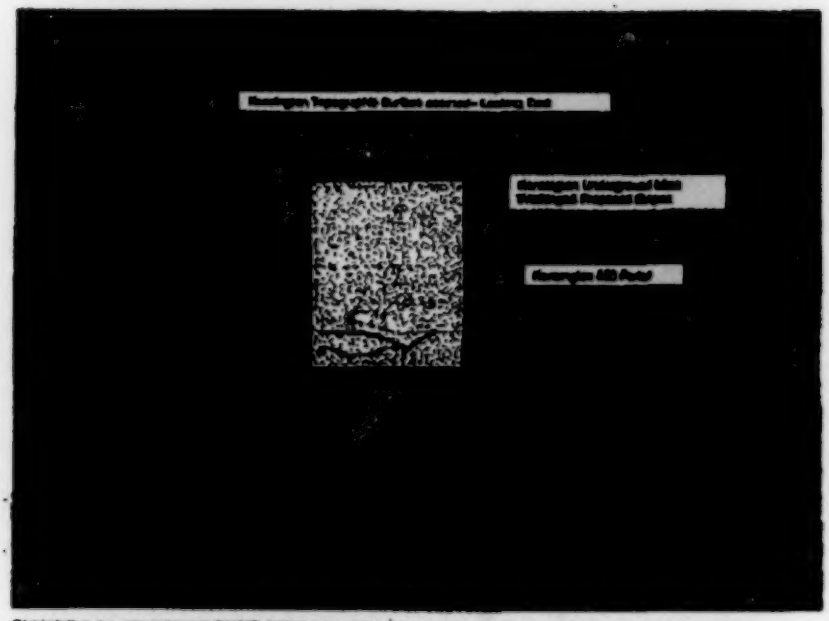

FIGURE 2-44. UNDERGROUND MINE WORKINGS UNDER ALTERNATIVES A1, B, C, AND D IN RELATION TO SURFACE WATER DRAINAGES

2.3.4 Ore Processing

Ore processing refers to the methods by which gold is separated from the surrounding material. The steps in ore processing would be nearly the same under all alternatives; the only difference would be the location of the processing facilities. Processing steps include crushing, grinding, flotation, thickening, and filtration. Under Alternatives A and A1, crushing would take place underground and all the other steps would be conducted in buildings. Under Alternatives B, C, and D, all steps would be done in buildings. Table 2-4 summarizes the chemicals and materials used in the milling process under each alternative.

Table 2-4
Chemical and Material Use

Milling Process	Reagent or Material	Container (Shipping and Storage	Approximate Daily Use (tons)	
			Alternative A	Alternatives A1, B, C, and D
Grinding	Steel balls	10-ton steel bins	5-6	4-5
Flotation	Potassium amyl xanthate	50-gallon drum	1	0.5
	MIBC (frother)	50-gallon drum	0.4	0.2
	Flocculant	1-ton Flo-bin	0.2	0.1
	Polymer	50-gallon drum	0.02	0.01
	Surfactant	50-gallon drum	0.04	0.02
	Scale inhibitor	50-gallon drum	0.1	0.05
	Lime*	1,000-lb bags	2	1

* Lime is also used in concentrate thickening.

The mill would be located at the Kensington process area under Alternatives A and Al and at the Malin process area under Alternatives B, C, and D. In each case, ore would be hauled from the active mining area and dumped down an ore chute. The material would then be sent through the primary crusher, which would reduce the size of the ore to less than 6 inches. The crushed ore would then be hauled by truck to the coarse ore stockpile at either the Kensington side (Alternatives A and A1) or Jualin side (Alternatives B, C, and D) of the operation. There, the ore would be fed into a hopper with a vibrating feeder and then onto a belt that would discharge into a semiautogenous grinding (SAG) mill.

The SAG mill would be set up in a closed circuit with a horizontal vibrating screen and a ball mill. Oversized material would be fed back into the SAG mill, while undersized material (minus 100 mesh) would be directed to hydrocyclones. Hydrocyclones use centrifugal force to separate coarse material from fine material. The heavy material (underflow) from the cyclones would be directed to a gravity concentrator used to recover coarse gold. Lighter materials from the cyclones would be fed back to the cyclone circuits, eventually overflowing from the cyclones to a conditioning tank feeding the flotation circuit.

The flotation process would involve separating the gold from the barren material in a froth flotation. A slurry would be fed from the cyclones to the conditioning tank, where conditioners (e.g., potassium amyl xanthate) and frothing agents would be added. These materials would cause the sulfide and telluride minerals (both gold-bearing) in the slurry to attach to air bubbles once air was pumped through the system. The bubbles containing the mineralized portion of the slurry, including the gold, would form a froth on top of the flotation tank. The gold-bearing froth would then be skimmed off and collected. This "concentrate" would flow through additional flotation tanks to further concentrate the gold. The flotation process would separate approximately 93 to 96 percent of the non-gold material from the ore fed into the system, leaving 160 to 280 tons (under Alternative A) or 80 to 140 tons (under Alternatives A1, B, C, and D) of flotation concentrate per day. Most of the chemicals added to the system would stay in the flotation tanks or be removed with the flotation concentrate as opposed to being discharged with the tailings. Most of the metals associated with the ore body would be removed from the system with the gold concentrate.

Following the final flotation, the concentrate would be dewatered before being placed into specialized 8-foot by 8-foot by 20-foot sealed marine transport containers for shipment to an existing, off-site processing facility outside Southeast Alaska. Under Alternative A the average production would be approximately 1,400 tons (40 containers) of concentrate per week. The production level would average approximately 700 tons (20 containers) of concentrate per week under Alternatives A1, B, C, and D.

2.3.5 Tailings Disposal

Tailings are the material that remains in the flotation tanks once the gold-bearing material has been removed. This Final SEIS evaluates two methods of tailings disposal. Under Alternatives A and A1, tailings would be placed in the DTF. Alternatives B, C, and D would employ wet (underwater or subaqueous) tailings disposal methods in the TSF constructed in Lower Slate Lake. Under all the alternatives, the operator would backfill some of the tailings to permit the maximum extraction of the resource and provide structural stability within the mine. Under Alternative A, the operator would backfill at least 25 percent of the tailings generated. Under Alternatives A1 , B, C, and D, the operator proposes to, backfill at least 40 percent of the tailings generated over the life of the operation.

Dry Tailings Disposal

The following discussion is taken from Section 2.3.6 (pages 2-20 through 2-22) of the 1997 SEIS. Additional detail on the DTF can be found in that document. Under Alternatives A and A1, the DTF would be constructed using methods similar to the construction of landfills. The slurry would be thickened to approximately 55 percent solids. The thickened slurry would be moved from the mill to the DTF through an 8,000-foot, gravity-fed pipeline. The pipeline would be built within the footprint of the haul road for most of its length. The pipeline would be approximately 14 inches in diameter with a 20-inch casing for spill containment. At the DTF the tailings would be dewatered, using plate filters (or the design equivalent), to a moisture content of 5 to 18 percent. The filter cake would then be loaded into trucks and placed in the DTF.

The DTF would be constructed in a series of three stages or cells. Before placement of the first lift of each cell, a series of foundation drains would be installed to form the base. The drains would be laid out in a herringbone pattern and consist of gravel wrapped in geotextile material. A minimum of 2 feet of waste rock or development rock would be placed over the drains. Each cell would consist of five to seven lifts, each 28 feet high. Tailings would be placed (unconsolidated) into the 28-foot lifts followed by 1 foot of compacted, low-permeability fine till and 1 foot of waste rock to provide a cover and working surface. Stockpiles of waste rock to be used in DTF construction would be placed within the footprint of the next cell. The final cover for the facility would consist of 6 to 8 feet of coarse and fine till. The underlying fine till layer would serve as a capillary break, and the overlying coarse till would promote infiltration and drainage. Growth media would be placed on the coarse till to support revegetation.

To ensure that tailings placed into the DTF did not contain excess moisture, there would be no temporary storage at the process area or the dewatering area. Tailings would be placed directly into the DTF or backfilled. The operation would generally expose less than 5 acres of tailings to direct precipitation at any one time (before concurrent covering and revegetation), as illustrated in Figure 2-15.

An engineered structural berm would be constructed around the north, south, and west sides of each cell to increase the stability of the facility. The berm would be constructed of waste rock, compacted tailings, or other suitable material. The berm would extend to a height of approximately 100 feet along the west slope and 50 feet along the north and south

slopes. Under Alternative A, the DTF, including the berm, would ultimately cover 113 acres and have a capacity of 20 million tons of tailings. Under Alternative A1, the DTF would cover approximately 40 acres and be able to store 4.5 million tons of tailings.

Subaqueous Tailings Disposal

Under Alternatives B, C, and D, tailings would flow by gravity as a slurry from the mill facility located on private land near the Jualin Mine portal to the TSF at Lower Slate Lake through a 3.5-mile pipeline (Figures 2-5 and 2-6). The pipeline would be double-walled, high-density polyethylene (HDPE), approximately 6 inches in diameter. Flow sensors with automatic shutdown mechanisms would be used to detect any blockages or breaks in the system.

Before the slurry left the mill, a polymer and flocculant would be added to agglomerate the small particles and enhance settling once the tailings were deposited into the TSF. The polymers and flocculants are not toxic and would have no effect on water quality beyond their capability to improve the efficiency of settling out fine material. The tailings slurry would be discharged into the TSF through perforations in a portion of the tailings delivery pipeline submerged in the TSF.

A portion of the perforated segment of the pipeline would always be above the bottom of the TSF, allowing the tailings to flow freely from the pipe. The perforations would be very large in comparison to the size of the tailings particles to prevent the tailings from clogging the pipeline. Valves would be placed in the delivery pipeline to allow for maintenance or relocation of the tailings discharge point (perforated pipe). The tailings pipeline would be moved periodically to ensure equal distribution of the tailings.

Under Alternative B, water from the slurry transport of tailings and natural inflow from the drainage basin would maintain a relatively consistent lake volume and thus provide water cover for the tailings. The tailings would be deposited to a final elevation of 704 feet with a constant cover of at least 9 feet of water. Figures 2-16 and 2-17 provide an overview of biological activity in Lower Slate Lake before and after mining operations. The maximum depth of the tailings at closure would be approximately 120 feet. The operational details of the facility at the initial dam construction stage (705 feet) have yet to be determined. Water would be recycled from the TSF for reuse in the process facilities at an average rate of 100 gallons per minute (gpm).

Under Alternative C, all natural inflows from the channel between the two lakes (Mid-Lake East Fork Slate Creek; see Figure 3-3) and the drainage areas surrounding the TSF would be diverted around the TSF. In this case, natural flows would be captured in diversion ditches, carried around the north and east shores of the TSF, and discharged to a drop structure constructed at the TSF dam spillway. Water from the TSF would not be recycled under Alternative C.

Under Alternative B, a drop-structure spillway would be installed at the east abutment of the dam to direct discharge from the TSF to East Fork Slate Creek. An energy dissipater at the bottom of the spillway would allow the water to flow into East Fork Slate Creek without affecting the downstream velocity in the creek. Operationally, water would be pumped from a clear portion of the pond, away from the tailings discharge, to the spillway inlet for discharge. The operator would manage the TSF so that the water is maintained at a steady level. This ap-

proach would maintain flow-through conditions so that releases from the TSF would be roughly equivalent to the natural inflow to the lake from natural sources. Under Alternative C, the discharge from the TSF would be pumped to the diversion channel, where it would combine with the natural flows in the diversion channel before flowing into East Fork Slate Creek below the embankment. Upon completion of mining operations, the lake ecosystem would be reestablished at its new level and flows would passively discharge through the permanent embankment spillway.

* * * * * * *

2.3.6 TSF Dam Construction

The TSF would be formed in part by the natural lake basin at Lower Slate Lake and a dam constructed at the outlet of the lake. The dam would be a concrete-faced rockfill dam constructed in two phases. During operations, the dam of the TSF would be 90 feet tall and approximately 500 feet long. The TSF would be sized to accommodate 4.5 million tons of tailings. Figure 2-19 shows the TSF dam. The phased approach to constructing the dam would allow tailings disposal to begin once the first stage of the dam was completed. The second stage would be built while mining operations and tailings disposal were active, likely 4 to 5 years into the process.

* * * * * * *

4.9.3 Effects Common to Alternatives B, C, and D

Under Alternatives B, C, and D, mine drainage would be treated the same as under Alternative A. However, most operations would occur within the Johnson Creek drainage (access roads and process

area) and the Slate Creek drainage (access roads and the TSF). The same indicators as described under Alternatives A and Al were used to compare the potential impacts.

Integrity of Freshwater Habitat

Alternatives B, C, and D would require a stormwater diversion channel above the Jualin Mine portal and process area bench and would discharge to Johnson Creek. Stormwater discharged from the diversion would not affect fish or other aquatic organisms.

Alternatives B, C, and D include tailings disposal in Lower Slate Lake through a slurry pipeline from the mill. For the purposes of this analysis, it is expected that all fish and most other aquatic life (such as macroinvertebrates, periphyton, and zooplankton) in Lower Slate Lake would be lost during operations as a result of this action. Some individuals might survive, but marginal food sources and the lack of suitable habitat as the lake elevation rises appear to be the major limiting factors.

Two species of fish are present in Lower Slate Lake: three-spine stickleback (a forage fish) and Dolly Varden char (a sport fish). Estimates of mortality based on the survey completed in 2001 indicate approximately 1,000 Dolly Varden char could be lost because of the tailings disposal in Lower Slate Lake (Kline, 2003a). The Dolly Varden char in Lower Slate Lake appear to be small and exhibit slow growth, according to a comparison of the literature on other Dolly Varden char in Southeast Alaska lakes (Kline, 2003a). As discussed in Section 3.9.2, the number of three-spine sticklebacks in Lower Slate Lake has not been defined, although it is likely greater than the number of Dolly Varden char. The entire population

of three-spine sticklebacks could be lost during operations.

Placement of tailings in Lower Slate Lake would raise the lake level to the point that most of both channels of Mid-Lake East Fork Slate Creek would become inundated. Kline (2003c) indicated that there is no evidence that Lower Slate Lake Dolly Varden char spawn in Mid-Lake East Fork Slate Creek. Dolly Varden char have been captured in this system in June, August, September, and October. In the accessible reaches of Mid-Lake East Fork Slate Creek, an average of seven Dolly Varden char were captured in each sampling effort. Of the fish captured in this system, 90 percent have measured less than 5.5 inches in total length. These fish represent the lower 50 percent of the Dolly Varden char hi the Slate Creek system and are thus unlikely to include sexually mature fish. This lack of evidence of stream spawning is not sufficient to rule out the possibility that some stream spawning occurs; however, in this case, it appears very limited.

Mortality of macroinvertebrates and other aquatic organisms would also occur in close proximity to the deposited tailings. As the water level in the TSF rose, lakeshore vegetation would become inundated and provide new microhabitat and detritus for colonizing macroinvertebrates. Generally, macroinvertebrate species adapted to highly variable stream environments are better able to tolerate change than those in more stable lake and pond environments (Mackie, 1998). Impacts on species abundance and diversity resulting from catastrophic substrate loss or degradation are well documented. Reports of heavily disturbed streams indicate that macroinvertebrate recovery can occur within time frames ranging

from months to a few years (Appendix C; Hill, 1975; Gore, 1985; Thomas, 1985), though responses can vary for individual species (Minshall, 1982).

Figures 2-16 and 2-17 provide overviews of Lower Slate Lake before operations and after closure. As discussed below under Sedimentation and in Appendix C, toxicity tests show that the tailings might not provide suitable habitat for macroinvertebrates. Over the long term, as natural materials redeposit throughout the lake, the larger shallow/productive areas should increase the available habitat (and corresponding fish and macroinvertebrate populations). In the proposed reclamation plan, after mine closure the lake would have at least an equivalent area of plant and shallow water macroinvertebrate habitat that is not covered by tailings. It is therefore assumed that post-closure habitat should be adequate to support a macroinvertebrate population at least comparable to the pre-mining population.

The work completed to date demonstrates that the TSF can be restored to at least equivalent habitat and fish populations after closure. The operational monitoring described in Section 2 would be used to further refine and optimize the reclamation plan. These data would be reviewed by the Forest Service and ADNR, which would approve and oversee implementation of the final reclamation plan.. As required by the ADNR Title 41 permit, downstream fish passage would have to be provided at closure from Upper Slate Lake through Lower Slate Creek to East Fork Slate Creek below the lakes. Upstream fish passage would not be restored from East Fork Slate Creek below Lower Slate Lake to Lower Slate Lake.

The existing Jualin access road would be maintained as the primary access to the mine under Alternatives B, C, and D. The road would be upgraded as needed to suit construction and operational requirements and extended from Jualin to the proposed mine portal using appropriate Forest Service BMPs. This road has two stream crossings over Johnson Creek. Existing bridges would be upgraded. Construction would be consistent with Forest Service standards and guidelines (TRAN214), including the use of erosion control and stabilization measures. The installation or improvement of the bridges would also be done under ADNR Title 41 permits that would address impacts on fish habitat.

* * * * * * *

Sedimentation

Sediment resulting from road construction and improvement and, to a lesser extent, from mine operation could be carried into the Slate and Johnson Creek drainages. Impacts on the stream systems from these relatively minor amounts of sediment from construction-related activities would be similar to those described under Alternative A.

Under Alternatives B, C, and D tailings would be deposited subaqueously into the TSF. AScI Corporation (2000a, 2000b) conducted habitability tests using several amphipods on shallow and deep Lower Slate Lake sediments, a control lake sediment, and sediment composed of Kensington Mine tailings. AScI Corporation (2000a, 2000b) conducted tests using *Hyalella azteca* and *Chironomus tentans* in the various sediments to determine effects on survival, growth, emergence, and egg production. Results of the habitability tests on *Hyalella azteca* indicated

the control lake sediments and Lower Slate Lake sediments (both shallow and deep) supported acceptable growth as defined by weight and length. The tailings sediment sample caused a statistically significant reduction in the survival of *Hyalella azteca* when compared with the control lake sediments and Lower Slate Lake shallow and deep sediments. Specifically, the survival of *Hyalella azteca* was as follows:

- 83 ± 13 percent in control lake sediments
- 76 ± 22 percent in Lower Slate Lake deep sediments
- 62 ± 28 percent in Lower Slate Lake shallow sediments
- 5 ± 8 percent in tailings sediments

The suggested USEPA minimum survival rate of *Hyalella azteca* for a 28-day sediment exposure is 80 percent. The effect of the tailings sample on *Hyalella azteca* reproduction could not be determined because of low survival in the tailings sample after 28 days.

Results of the habitability tests on *Chironomus tentans* indicated that the control lake sediments, Lower Slate Lake sediments, and tailings supported acceptable 20-day growth. Samples from shallow Lower Slate Lake and deep Lower Slate Lake and tailings samples supported emergence rates of 85 percent, 53 percent, and 43 percent, respectively, showing a statistically significant reduced emergence rate of *Chironomus tentans* when compared with the control lake sample and shallow Lower Slate Lake sediments. USEPA recommends a minimum endpoint of 50 percent for emergence.

These results indicate that mortality of and reproductive effects on *Hyalella azteca* and *Chironomus*

tentans that attempted to recolonize the deposited tailings would occur as a result of subaqueous tailings deposition in the TSF. It is likely that similar effects on other macroinvertebrates and aquatic insects would occur. Appendix C shows that the sediment is not toxic to fish populations. However, the reduced number of macroinvertebrate and aquatic insect forage species might indirectly affect post-deposition fisheries populations. As discussed previously, it is assumed that the majority of the fish and other aquatic life in Lower Slate Lake would be lost during operations as a result of tailings disposal. Some individuals might survive, but limited food sources and the lack of suitable habitat as the lake elevation rose appear to be the major limiting factors.

At closure, the shallow aquatic habitat that is not covered by tailings should support near-term restoration of the macroinvertebrate and fish populations in the lake. Modeling shows that the tailings would not generally resuspend and redeposit over the natural sediment areas (Appendix C).

Finally, some uncertainty is associated with these analyses, including the tailings toxicity test results. Reasonable "worst-case" assumptions, however, have been made here and in Appendix C in presuming that all aquatic life would be lost in the TSF during operations and that the tailings would not support macroinvertebrates after closure (Tetra Tech, 2003b). As additional test and operational data became available, the mine operator would modify tailing deposition procedures and the reclamation plan to maximize opportunities for improving aquatic resources in the lake.

* * * * * * * *

Functional Losses. The predominant wetland types that would be affected by Alternatives B, C, and D are forested and emergent wetlands. Forested wetlands at the outlet of Lower Slate Lake received high functional ratings for wildlife habitat, carbon/detrital export, and fish habitat. They received moderate ratings for sediment/shoreline stabilization and nutrient cycling. Emergent wetlands within the vicinity of the proposed process area received moderate ratings for all functions except groundwater interchange (low). Wetlands in the vicinity of the Slate lakes and Spectacle Lake form a large forest and emergent wetland 'system. This area would experience approximately 23 acres of impacts under Alternative B, almost 35 acres under Alternative C, and 25 acres under Alternative D. The forested/emergent system provides high levels of wildlife habitat and moderate values for fish habitat, nutrient cycling, carbon/detrital export and sediment/toxicant retention. Of the additional affected acres under Alternative C, the inundation of 11 acres around Upper Slate Lake would occur only during the life of the project. These wetlands would be expected to reestablish once the water levels receded. Construction and operation of the TSF would result in the permanent loss of 23 acres (13.5 acres of forested wetlands and 9 acres of emergent wetlands).

The direct loss of function would result from the placement of fill, burial by tailings, or inundation. With the exception of the areas inundated by the TSF or buried by the dam, impacts on forested wetlands would remain in place through the duration of operations and would begin recovery with reclamation. The loss of the habitat function would not occur simply as result of construction and operation of the project because the presence of humans and equip-

ment would likely affect the habitat values well beyond the direct impacts on, forested wetlands. The loss of hydrologic functions of the DTF began. Under Alternative A, some of the palustrine forested and scrub-shrub wetlands in other portions of the project area would become emergent or aquatic bed wetlands (borrow areas), while others would be encouraged to return to their pre-mining form following reclamation. Alternative A1 would have proportionally fewer impacts on wetlands in the terrace area because of the reduced footprint of the DTF.

By comparison, Alternatives B, C, and D would affect substantially fewer acres of wetlands but would affect a greater number of wetland types, including palustrine emergent, palustrine aquatic bed (Upper Slate Lake), and lacustrine (Lower Slate Lake). Lower Slate Lake provides high values for fish habitat, high values for wildlife habitat, and moderate values for nutrient cycling and carbon export. Upper and Lower Slate lakes provide aquatic habitat for the Dolly Varden char, three-spine sticklebacks, and benthic organisms that inhabit the lake. In addition, the lake margins support the wide variety of wildlife in the area, including moose and Vancouver Canada geese. Not all functions provided by the lakes would be lost during construction and operations; however, the value for fish habitat is assumed to be lost for the duration of operations and the value in terms of wildlife habitat would be reduced at a minimum. Nutrient cycling and production export values would also be lost during operations. The diversity in form provided by the palustrine emergent wetlands provides moderate wildlife habitat values and sediment retention, as well as high values for flood flow alteration. The forested wetlands would provide values

similar to those associated with Alternatives A and A1. Impacts on the emergent, forested, and shrub-scrub wetlands would remain at least through the duration of operations; the extent of recovery following reclamation would depend to a great extent on the extent of fill removal and reestablishment of wetland hydrology.

Alternative C would also affect Upper Slate Lake (palustrine aquatic bed) during operations. The effect of losing or reducing the functions of both lakes simultaneously during operations would be substantially greater than the effects on Lower Slate Lake alone under Alternatives B and D, including the loss of nutrient cycling, and production export and loss/reduction in value of habitat for fish (see Section 4.10) and wildlife (see Section 4.11). Upper Slate Lake and the wetlands surrounding it would recover from the impacts from inundation after reclamation; however, the recovery of emergent and submergent wetland vegetation along the margins of the lake would take years, with herbaceous vegetation recovering first, followed by shrubs and trees.

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Appendix C

Ecological Risk Assessment of Aqueous Tailings Disposal at the Kensington Gold Mine

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4.3.3 pH

Only direct exposure of aquatic receptors to water is considered an issue for pH in the ERA. In general, the scientific literature on pH is concerned with low-pH conditions rather than high-pH conditions. As a result of the milling process, the tailings decant wa-

ter has high pH levels (Table 3.1). The Gold Book (USEPA, 1986) lists a pH range of 6.5 to 9.0 for aquatic life, though there is no support provided for the upper value of 9.0. McKean and Nagpal (1991) report that a high pH (>9.5) can disrupt ammonia excretion across the gill epithelium and that a pH of more than 10.2 results in salmonid mortality.

4.3.3.1 Worst-Case Water

The decant water has a pH of approximately 10, which is above the protective concentration pH range of approximately 6-9 for aquatic life. Although a pH of 10 would likely pose a risk to aquatic biota in the TSF, elevated pH levels are expected to occur only in the immediate vicinity of the tailings pipe outfall and perhaps in the pore water of small spatial areas around the outfall. The LSL volume of at least 1.4 x 10^8 gallons would be orders of magnitude greater than the projected daily tailings input of 2.1 x 10^5 gallons per day (148 gallons per minute [gpm]).

APPENDIX J

Kensington Gold Project

Supplemental Environmental Impact Statement

Volume 1: Sections 1-10

Lead Agency
USDA Forest Service, Tongass National Forest

Cooperating Agencies
US Environmental Protection Agency, Region 10
US Army Corps of Engineers, Alaska District
Alaska Department of Natural Resources

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December 2004

BEST AVAILABLE COPY

Record of Decision

USDA FOREST SERVICE

Kensington Gold Project

Juneau Ranger District
Tongass National Forest

Decision to be made

This Record of Decision documents my selection of an alternative that will be used to amend the 1997 Plan of Operations for the Kensington Gold Project. My decision is based on the analysis and evaluations in the 2004 Final Supplemental Environmental Impact Statement (FSEIS) as well as information incorporated by reference from the 1997 FSEIS and ROD and the 1992 FEIS and ROD.

While the 2004 FSEIS considers and discloses all direct, indirect and cumulative impacts related to this project, regardless of land ownership or jurisdiction, my decision addresses only those project components subject to my authority over National Forest System lands. Other Federal and State agencies and the City and Borough of Juneau have authority to issue specific permits on National Forest System lands and elsewhere. In particular, both the Environmental Protection Agency and the U.S. Army Corps of Engineers have yet to exercise their permitting authority over this project and have indicated their intent to issue separate Records of Decision based on this FSEIS. The State of Alaska will also rely on much of this analysis to approve activities on state lands and issue applicable permits. Implementation of my deci-

sion to select an alternative is subject to the completion of those necessary permit processes by the other federal, state, and local authorities.

As part of this decision I will also consider recommendations from an interagency team to modify three small Old Growth Habitat reserves located in the project area.

Background

The Kensington Gold Project is an underground gold mine located approximately 45 miles north-northwest of Juneau, Alaska. The recent history of the Kensington Gold Project began in 1990 when the Kensington Venture (a joint venture between Coeur Alaska, Inc. [Coeur] and Echo Bay Exploration) submitted plans to the Forest Service to develop the Kensington mine. The Forest Service completed the *Kensington Gold Project Final Environmental Impact Statement* (1992 FEIS) and Record of Decision (ROD) in 1992 to consider and disclose environmental impacts that could arise from the project. Alternative F, Water Treatment – Option 1 was selected as the basis for a plan of operations which was subsequently approved by the Forest Service in July 1992. Alternative F consisted of underground mining, ore processing using cyanide vat leaching, tailings impoundment in Sherman Creek, marine discharge of process wastewater and various support facilities including liquefied petroleum gas for power generation.

In 1995, prior to obtaining all necessary permits, the joint venture was dissolved and Coeur became the sole stakeholder in the property. Coeur submitted an Amended Plan of Operations to the Forest Service in September 1995.

In June 1996 Coeur revised the 1995 Amended Plan of Operations in response to issues raised during scoping and at meetings with state and federal agencies. The 1996 Amended Plan of Operations was analyzed in the *Kensington Gold Project Final Supplemental Environmental Impact Statement* (1997 SEIS) and a ROD signed in August 1997 in which Alternative D (the No Action Alternative in the current SEIS) was selected. Major project changes approved as part of Alternative D in the 1997 decision included off-site shipment of concentrate rather than on-site cyanide leaching, elimination of the slurry disposal dam in Sherman Creek in favor of a dry tailings disposal facility and use of diesel fuel rather than liquefied petroleum gas for power generation. The Forest Service approved an amended plan of operations, consistent with the selected alternative, on May 28, 1998. Coeur obtained all permits necessary for construction from federal, state, and local authorities.

In 2001 Coeur submitted an amendment to the approved 1997 Plan of Operations for the stated purpose of improving efficiency and reducing the extent of surface disturbance of the approved project. The amended plan proposes a number of changes to the 1997 approved plan, including changing the location of the processing facilities from National Forest System lands in the Sherman Creek drainage to private lands in the Johnson Creek drainage near the historic Jualin Mine workings, tailings disposal in Lower Slate Lake, an access tunnel from the mill to the Kensington claims and a daily commute of workers via shuttle boat rather than on-site housing with helicopter access. The operation would also mine a smaller portion of the ore body containing a higher average gold concentration than proposed under pre-

vious plans. The amended plan calls for the construction of two marine terminals on state tidelands; one at Slate Creek Cove and one at Cascade Point, adjacent to lands owned by Goldbelt Incorporated (Goldbelt), an Alaska Native corporation. Goldbelt would own and operate the Cascade Point dock as well as the ferry service between the two marine facilities. See Chapters 1 and 2 of the FSEIS for a more detailed description of the proposed action and alternatives.

The Forest Service directed the preparation of this SEIS using a third-party contractor, Tetra Tech, Inc. The U.S. Environmental Protection Agency (USEPA), U.S. Army Corps of Engineers (USACE), and Alaska Department of Natural Resources (ADNR) participated as cooperating agencies with the Forest Service in preparing the SEIS.

The current SEIS was developed to evaluate proposed changes to the approved plan of operations which could effect National Forest System, State of Alaska, Goldbelt Native Corporation and private lands. Approval for components not on NFS lands will be accomplished through other state and federal agencies with jurisdiction. This SEIS is intended to supplement the 1997 SEIS and 1992 FEIS. According to requirements in the Council on Environmental Quality regulations for implementing NEPA (40 CFR Part 1500), this document analyzes and discloses the direct, indirect, and cumulative impacts associated with the proposed changes to the approved plan of operations.

Decision

Based on the analysis and evaluation in the SEIS for the Kensington Gold Project, it is my decision to se-

lect Alternative D. In conjunction with this decision, I am also approving a non-significant Forest Plan amendment to enlarge three Old Growth Habitat reserves as recommended by an interagency review team and described in Appendix 1 to this ROD.

My decision is based upon the analysis and evaluation in this 2004 Final SEIS as well as information incorporated by reference from the 1997 SEIS and ROD and the 1992 EIS and ROD.

My selection of Alternative D, as described in the SETS, approves modifications to the 1997 Approved Plan of Operations to include the following:

- A Tailings Storage Facility (TSF) will be located at Lower Slate Lake rather than a Dry Tailings Facility (DTF) near Comet Beach. The TSF will be sized to accommodate 4.5 million tons of tailings and will ultimately increase the size of Lower Slate Lake from 23 acres to 56 acres. East Fork Slate Creek will be dammed between Upper and Lower Slate Lakes and diverted by pipeline around the TSF. The construction and operation of a water treatment system for the TSF discharge is authorized as required to meet NPDES permit limits. All discharge waters are required to comply with conditions to be established in a National Pollution Discharge Elimination System (NPDES) permit administered by the USEPA.

- Surface processing of ore will be done at mill facilities located on patented (private) lands in the Johnson Creek drainage. A floatation process will be used to separate gold from tailings and gold concentrate will be shipped off-

site for further processing. Tailings will be transported as slurry through a 3.5-mile long pipeline from the mill to the TSF at Lower Slate Lake. Approximately 40% of tailings will be backfilled into underground workings.

- The existing Kensington and Jualin Mine access roads will be upgraded to safely accommodate mine traffic. Two new bridges will be constructed on the Kensington access road and two existing bridges will be upgraded on the Jualin access road. A 3.5-mile pipeline access road and a 1-mile cutoff road will be constructed. All road construction on NFS land will be subject to Forest Service standards and guidelines utilizing Best Management Practices (BMPs).
- Dry Tailings Facility (DTF), personnel camp, and mooring facilities located at Comet Beach will be eliminated.
- A tunnel to connect the Kensington Mine with ore processing facilities on private land near the Jualin Mine in the Johnson Creek drainage will be built.
- A permanent waste rock disposal facility at a 31.5-acre site near the Kensington 850-foot portal and a 4.8-acre site near the Jualin Mine process area will be developed.
- Surface water diversions will be built above the Kensington Mine 850-foot portal and waste rock disposal area, the Jualin process area and mine portal, and the diversion pipeline around the TSF.

- A fresh water infiltration gallery will be constructed in Johnson Creek, subject to ADNR approval, and a 300,000 gallon tank will be built at the Jualin process area for fresh water. A water recycle pipeline will be constructed alongside the tailings slurry pipeline to return process water to the mill.
- Diesel fuel delivery, transport, and storage using 6,500 gallon isotainers. Isotainers will be placed in the laydown area at Slate Creek Cove, near power generation facilities, and at equipment fueling areas. All isotainers will be stored in HDPE-lined and bermed storage areas.
- The development of two new sand and gravel borrow areas, as well as the continued use of two existing borrow areas, disturbing approximately 7.1 acres will provide construction materials.

Included in the Selected Alternative is my decision to adopt the mitigation and monitoring measures identified in the 2004 SEIS as described in section 2.5 that are within the authority of the Forest Service. This includes mitigation measures for safety, and the protection of the environment. My decision is also premised upon other permitting agencies adopting the mitigation and monitoring measures identified in the SETS that are within their authority. In the event that the other mitigation and monitoring measures are not adopted, I will review this decision to determine whether any changes are needed.

The legal framework applicable to authorizing a large mine requires permits from different federal agencies, each of which must engage in consultation

under Section 7 of the Endangered Species Act before the project may proceed. In particular, the mine operator must receive a permit under Section 404 of the Clean Water Act from the U.S. Army Corps of Engineers before construction or operation of marine terminals in Berners Bay. The USACE (and the Forest Service) initiated formal consultation under Section 7 and the USACE will not issue any permit for the marine terminals until consultation is completed. The USACE retains full discretionary authority to deny or condition the terminal permits in response to a biological opinion or the identification of reasonable and prudent alternatives. Therefore, my decision on the plan of operations does not constitute an irretrievable or irreversible commitment of resources foreclosing any reasonable and prudent alternatives with regard to the marine terminals that might be found necessary to avoid jeopardy to an endangered or threatened species.

In addition to a Section 404 permit, the operator must receive Tidelands Leases (Alaska Department of Natural Resources) for construction and operation of marine terminals. Operation of crew transport ferries across Berners Bay and barge traffic is subject to National Marine Fisheries Service (NMFS), U.S. Coast Guard, and Alaska Department of Environmental Conservation regulation. The City and Borough of Juneau (CBJ) has issued an Allowable Use Permit to Coeur for mining operations and Slate Creek Cove marine facility operation. Goldbelt has received a CBJ Conditional Use Permit for operations at Cascade Point.

Rationale for the Decision

In making my decision, I considered the many concerns raised during the analysis of this project, as

well as those raised during the preparation of earlier NEPA documents related to the Kensington Mine. I took into account competing interests and values of the public and included mitigation measures, where possible, to avoid or minimize undesirable effects. All alternatives considered in detail are consistent with Forest Plan standards and guidelines designed to protect resources within the project area. I have carefully reviewed relevant information documented in the SEIS, discussions between cooperating agencies, and mitigation measures applicable to the project. Chapter 2 of the SEIS contains a detailed summary of the effects of each alternative both in tabular and narrative form. Based on that review, I believe that the actions described in Alternative D will be permitted by the other regulatory agencies.

I have also considered input from USEPA in their December 1, 2004, memo (SEIS — Appendix K) identifying their Environmentally Preferred Alternative (Alternative A) and Preferred Alternative (Alternative. A). USEPA stated that their input was provided without the benefit of a completed practicability evaluation by the USACE or a completed Biological Opinion from NMFS.

I am confident those analyses, when completed, will provide information leading to reasonable environmental mitigation measures for project components subject to the regulatory authority of the cooperating agencies.

I have also considered the advice of the State of Alaska in its memo December 1, 2004 (SEIS — Appendix K) to me regarding environmentally preferable and preferred alternatives. The State identified both Alternatives A and D as environmentally preferable and Alternative D as its preferred

alternative. The State of Alaska is confident that mitigation measures identified in the FSEIS, the conditional and allowable use permits issued by the CBJ, agreed to by Coeur in its transportation plan, and those identified in the BA/BE submitted to NMFS on November 17, 2004, will all serve to reduce impacts to minimal levels for resources under the jurisdiction of the State of Alaska, herring in particular. The State of Alaska will be including a number of those mitigation measures in its Tidelands leases for marine facilities and Alaska Coastal Zone consistency review. I agree with the comment and analysis provided by the State.

As noted above, other agencies have the final decision in authorizing the type of transportation system to be used to access National Forest System lands. The FSEIS does, however, attempt to predict likely effects to non-National Forest resources based on anticipated activities and both mandatory and anticipated mitigation. Based on this an[illegible] current mitigation requirements appears that the effects to wildlife, fish, and recreational resources in Berners Bay are minimal. It is also possible that additional permit conditions could be imposed under both the USCOE permit and the State of Alaska tidelands lease that would further reduce impacts. Given this conclusion, and the level of concern regarding the effects of helicopter transport on wildlife and recreation expressed during the 1992 and 1997 analyses, both helicopter and vessel transport result in low to moderate effects on various resources, including the recreational setting. As a result transportation related effects are not a deciding factor in my selection of Alternative D.

Alternative D provides the best combination of components to minimize ground disturbance, reduce impacts to wetlands, provide safe and efficient transportation of workers, and reduce on-site fuel storage with the related risk of fuel spills within the framework of existing laws, regulations, and policies while meeting the stated purpose and need.

The Forest Service generally encourages use of private land for construction of privately owned facilities and roads where possible. Alternative A has the greatest impact on NFS lands in terms of surface disturbance (248 acres) whereas alternatives B, C, and D put more of the disturbance onto privately held lands, and impact less acreage of NFS lands (157 acres, 177 acres, and 159 acres respectively for alternatives B, C, and D).

The EPA has indicated that both Alternative A and Alternative B could be permitted under an NPDES permit pursuant to the Clean Water Act. Without additional water treatment, neither Alternative B nor Alternative C could meet expected NPDES permit conditions at all times and, therefore, could not discharge to Slate Creek under all conditions. Alternative C also does not include process water recycling which the EPA has indicated will be required by the NPDES permit (40 CFR 440.104(b)). The open channel diversion of East Fork Slate Creek around the TSF in Alternative C would provide the same minimum in-stream flows to Slate Creek as Alternative D, but would result in more ground disturbance and be more difficult to maintain than the pipeline diversion in Alternative D. Modifying either alternative to address these concerns would make them similar to Alternative D.

Alternative D disturbs approximately 197 acres, of which 96 acres are wetlands, while Alternative A (No Action) disturbs 268 acres, all of which are wetlands. Although the total disturbed wetland acreage is low for all alternatives, Alternative D does reduce wetland disturbance by 171 acres compared to the previously approved plan and virtually all of the wetlands affected by Alternative D will be reclaimed following closure. Approximately 164 acres of wetlands lost to the TSF under Alternative A would not be regained.

Under Alternative D, water treatment and tailings capping offer reasonable assurances that water quality downstream of the TSF will be protected. Reclamation of the TSF, post closure, will recreate habitat lost during operations and restore a viable fish population comparable to pre-operational conditions.

Both the DTF under Alternative A and the TSF under Alternative D pose a minor threat due to the potential for design failure. Any tailings facility approved will be required to be built to high standards. Construction of the TSF dam will require certification from the Alaska State Dam Officer and bonding for maintenance in perpetuity.

Alternative D provides for safer handling of fuels compared to Alternative A. The risk of diesel spills is reduced under Alternative D by requiring all diesel fuel to be delivered, transported, and stored in isotainers rather than pumped from a fuel barge at Comet Beach as under Alternative A. Since fuel storage facilities under all alternatives would be within approved containment the effects of a spill at those facilities would be minimal should one occur.

Slate Creek Cove offers more reliable and safer conditions for marine traffic. This reduces the need to store excess fuels, chemicals, and materials onsite as a contingency for weather delays.

Construction of 4.5 miles of road, common to alternatives B, C, D, results in a minimal change to the character of Roadless Area 301. Roads not required for future monitoring and maintenance will be reclaimed following mine closure and revegetated with native plant species.

The 122-acre DTF under Alternative A would be highly visible from Lynn Canal, the only Visual Priority Travel Route (VPTR) impacted by project components on NFS lands. Figure 4-1 in the SEIS provides a visual simulation of this effect. By eliminating this component, my decision reduces visual impacts along the VPTR.

I recognize the high recreational value of Berners Bay to users. Berners Bay is an outstanding resource that provides unique opportunities for wildlife and landscape viewing. Portions of the operations will be visible from the Forest Service Berners Bay Cabin, Echo Cove, and Point Bridget. Impacts to users of Berners Bay are related to marine facilities at Cascade Point/Echo Cove and Slate Creek Cove and the vessel traffic between them. Although these project components are outside of National Forest System lands, the impacts related to them have been evaluated in the SEIS and are considered in my decision. The Forest Service will work, to the extent practicable, with the other Federal, State, and local agencies, as well as with the operator to minimize these impacts. I believe recreational values will be maintained with the mitigation measures considered in the SEIS. I also recognize that there may be some

forest users that find even these minimal impacts to be unacceptable.

Alternatives Considered in Detail

Four alternatives were considered in detail, including the No Action Alternative. This range of alternatives addressed the major issues associated with this project. The three action alternatives differed from each other in the type and location of various project components. The alternatives are summarized below. Table 2-5 in the FSEIS compares alternatives by key project components.

Alternative A – No Action – As a result of this alternative, the Forest Service would not approve proposed changes to the 1997 Approved Plan of Operations. This alternative includes underground crushing of ore with aboveground grinding and flotation. Flotation concentrate would be shipped to a processing facility off-site. Employees would be housed on-site and transported by helicopter for weekly rotations. Supplies, including fuel, would be delivered to a marine terminal on Comet Beach. Tailings would be dewatered before being placed in a dry tailings facility (DTF) facing Lynn Canal. The DTF would have the design capacity to hold 20 million tons of tailings and would include an engineered berm around each cell of the facility. The production rate would be 4,000 tons of ore per day and 400 tons of waste rock per day. The waste rock would be used in the construction of the DTF. Road and DTF construction would require the development of sand, gravel, and till borrow areas.

Alternative A1: Reduced Mining Rate, DTF – Alternative A1 illustrates the impacts that might occur if the No Action Alternative were selected and the operator chose to mine the same ore volumes pro-

posed in the action alternatives. Alternative A1 reflects a mining plan similar to that described for Alternative A but uses a mining rate and tailings production levels consistent with the Proposed Action (2,000 tons per day and 7.5 million tons total, respectively). *The effects of Alternative A1 were included in the FSEIS for comparison purposes only. The Forest Service does not regulate mining rate or target ore body.*

Alternative A1 would result in 4.5 million tons of tailings being placed in the DTF, assuming 40 percent of the tailings would be backfilled. The DTF would be approximately 65 percent smaller than it would be under Alternative A. The reduced mining rate presented under Alternative A1 would produce very limited amounts of waste rock for DTF construction. For this reason, the impact analysis assumes the same number of acres of sand and gravel borrow areas would be required as under Alternative A, although the coarse and fine till borrow area would be reduced in size. Other aspects of Alternative A1, including transportation of employees and materials, would remain the same as those described under Alternative A. The life of the operation would be reduced to ten years following two years of construction.

Alternative B: Proposed Action – Alternative B reflects a number of changes to the mine plan compared with the No Action Alternative, including constructing a tailings storage facility (TSF) in Lower Slate Lake, relocating milling operations to the Johnson Creek drainage, and eliminating the personnel camp. The operation would mine a smaller amount of ore with a higher average gold concentration compared with that proposed under Alternative

A. Alternative B would include the development of a tunnel connecting the existing Kensington Mine to the process area located near the Jualin Mine in the Johnson Creek drainage. Access to the site would be from marine terminals built in Slate Creek Cove and at Cascade Point. Crew shuttle boats would transport employees daily to and from the project site. The TSF would be sized to accommodate the disposal of 4.5 million tons of tailings. Borrow areas would need to be developed for construction of the TSF dam and roads. The production rate would be approximately 2,000 tons of ore per day. This alternative includes recycling water from the TSF to the mill circuit. Alternative B would require upgrading the 5-mile-long access road from Slate Creek Cove and constructing a 3.5-mile pipeline access road and a 1-mile cutoff road connecting the other two roads.

Alternative C: Dock Location and Design/ Diversion – Alternative C would eliminate the dock at Cascade point and instead include a dock in Echo Cove, approximately 0.75 mile north of the existing Echo Cove boat ramp. Also, the landing craft ramp at the Slate Creek Cove marine terminal would be eliminated, minimizing the amount of fill placed in the intertidal zone. Alternative C does not include recycling process water from the TSF and the mill circuit. This alternative would include diversion channels to direct the flow from Mid-Lake East Fork Slate Creek and overland runoff from undisturbed areas around the TSF. The diversion would discharge to a spillway at the top of the TSF dam. The diversions would require a dam on Upper Slate Lake to maintain water levels sufficient to reach the spillway at the TSF dam. The purpose of the diversion would be to minimize the volume of fresh water in contact with the tailings. The remaining project

components, including the production rate of 2,000 tons per day of ore and the access tunnel, would be the same as those under Alternative B.

Alternative D: Modified TSF Design and Water Treatment – Alternative D was developed to address comments received and concerns about the TSF effluent meeting NPDES permit limitations intended to protect downstream water quality in East Fork Slate Creek below the TSF. Alternative D includes a dam in Mid-Lake East Fork Slate Creek that would gravity feed a pipeline diversion around the TSF. Water would be pumped from the TSF to a reverse osmosis treatment system that would remove solids and metals to ensure compliance with permit limits. The treatment system would discharge to the diversion pipeline. Alternative D also requires the tailings placed in Lower Slate Lake to be capped if the operator cannot demonstrate that the tailings are re¬colonized by plant and shallow-water macro invertebrates at least comparable to pre-mining conditions. The remaining project components would be same as those under Alternative B. Alternative D, the selected alternative, is described in more detail above.

Environmentally Preferable Alternative

Environmentally Preferable Alternatives) is (are) the alternatives) that cause the least damage to the biological and physical environment and which best protect, preserve, and enhance historic, cultural, and natural resources.

I have identified Alternatives A and D as the environmentally preferable alternatives. While both alternatives include environmental impacts ranging from short to long term, each are protective of water and air quality standards. Each has different envi-

ronmentally negative and positive aspects that, when compared, make the two alternatives different but near equal with respect to overall impact to the environment. I have reviewed input from the USEPA and the ADNR in reaching my determination. The written conclusions and rationale from both agencies are provided in Appendix K to the SEIS. While the Forest Service and ADNR appear to be in agreement about the relative effects of the alternatives on the environment, the USEPA differs in its relative weighing of project effects. Several interagency working meetings were held to attempt to reach consensus regarding the environmentally preferable alternative but, contrary to the USEPA' s view, no group consensus was reached.

Comparing numerical differences of similar effects between alternatives (i.e. acres) provides one means of differentiating between the alternatives but is limited to easily measurable effects. Weighing the actual importance of an impact on one resource against a different impact on another resource is a much more difficult undertaking. For example; weighing the extremely low risk of a catastrophic event in one alternative against the certainty of a very small impact in a different alternative results in a very subjective ranking of one alternative against another. In the end, in my opinion, a meaningful difference between Alternatives A and D was not apparent based on the resource values affected, nor the degree to which those values would be affected. Chapter 2 of the SEIS contains a detailed summary of the effects of each alternative both in tabular and narrative form. Chapter 4 of the SEIS contains a detailed discussion of those effects.

Alternatives Eliminated from Detailed Analysis

There were a number of alternatives and project components studied in the 1992 FEIS and 1997 SEIS including submarine tailings disposal, marine discharge of wastewater, and wet tailings disposal in the Sherman Creek drainage, among others. Those discussions are not repeated here. This FSEIS discusses a number of additional alternatives and components including disposal of tailings in Upper Slate Lake, use of tailings in the construction of the Juneau Access Road, helicopter access during eulachon and herring runs, and Cascade Point to Comet Beach crew shuttle access among others. Each is briefly discussed and reasons for not considering the alternative or project component in detail are listed.

Mitigation, Monitoring, and Reclamation

The FSEIS, Chapter 2, Mitigation and Monitoring list the mitigations measures required as part of alternative D that are designed to avoid or minimize potential environmental impacts during construction, operation, and project reclamation. A summary of mitigation measures and a summary of monitoring measures, including various authorities and the responsible parties, are identified in Table 2-6 and 2-7 of the FSEIS respectively. These mitigation measures have been used successfully in other projects with similar types of activities. As a result, they are considered effective and are made part of this decision. The mine operator will be required, as part of the amended plan of operations, to submit mitigation and monitoring plans. Mine construction may not begin until the Forest Service approves the plan of operations.

Environmental monitoring programs that meet the requirements of the Forest Service, USEPA, ACOE,

ADNR, ADEC and other agencies will be implemented. These programs will be designed to determine compliance of the project with the plan of operations, other federal, state and local permits, and to validate the projected effects of the project's construction, operation, reclamation, and post-closure conditions. Impacts that are likely to or do result in violations of regulatory stipulations will require alterations of project operations and/or additional mitigation actions.

Permits, Licenses and Certifications

To proceed with development of the Kensington Gold Project as approved in this ROD, various permits, licenses and certifications must be obtained from federal, state, and local agencies. The following permits must be obtained:

USDA Forest Service

Approval of the amended plan of operations including posting of the approved reclamation bond.

U.S. Army Corps of Engineers

Clean Water Act Section 404 Permits

Rivers and Harbors Act Section 10 Permits

U.S. Environmental Protection Agency

Clean Water Act Section 402 - National Pollutant Discharge Elimination System Permit

Clean Air Act

State of Alaska, Department of Environmental Conservation

Clean Water Act Section 401 Certification of the USACOE Section 404 permit

Clean Water Act Section 401 Certification of the USEPA Section 402 - NPDES permit Air Quality Control Permit

Domestic wastewater system plan approval

Boat requirements (SPCCP and financial assurances)

State of Alaska, Department of Natural Resources

Water rights authorizations

Tidelands leases for marine facilities

Alaska Coastal Zone consistency review

Certificate of Approval to Construct a Dam

Title 41 authorizations for fish passage and fish habitat Right-of-way authorizations

Approval of the reclamation plan.

City and Borough of Juneau

Allowable Use Permit for Gold Mine Development and Production within the Rural Mining District at Berners Bay. (Approved September 13, 2004)

Conditional Use Permit to allow development of a ferry dock and related access at Cascade Point. (Approved October 15, 2004)

Public Involvement

On September 13, 2002, the Forest Service published a Notice of Intent to prepare a Supplementary Environmental Impact Statement (SEIS) for the proposed project in the Federal Register (Vol. 67, No. 178, Page 58011-58012). Cooperating agencies as defined in 40 CFR, section 1501.6 are the U.S. Army Corps of Engineers, Environmental Protection Agency, and The State of Alaska. The National Marine Fisheries Service (NMFS) was invited to participate as a coop-

erating agency, but declined. A Memorandum of Understanding was executed that included the following State of Alaska agencies as participants in the development and review of the SEIS: Alaska Department of Natural Resources (ADNR), Alaska Department of Environmental Conservation (ADEC), and Alaska Department of Fish and Game (ADF&G). On the date of the Notice of Intent, the *Kensington Gold Project Amended Plan Of Operations; Supplemental Environmental Impact Statement; Scoping Document; USDA Forest Service, Juneau Ranger District; September 2002* was distributed to agencies, organizations, tribes, and persons who had previously expressed interest in minerals projects on the Tongass National Forest. Outreach was conducted with public service announcements in the Juneau Empire and by radio media.

On September 17, 2002 a scoping meeting/open house was held in Juneau, Alaska at Centennial Hall, and a second open house on September 19, 2002 in Haines, Alaska at the City Council chambers in City Hall. The open houses were designed to provide background information or technical assistance that the public or interested agencies might need before commenting. The scoping document was made available at these meetings. The formal comment period ended October 15, 2002.

The following significant issues were identified based on comments from the public, other agencies, federally recognized tribes, and non-governmental organizations.

1). Marine-related transportation will impact users of and resources within Berners Bay.

2). Construction and operation of the tailings disposal facility and other mine facilities will impact aquatic resources from Slate and Johnson Creeks to Slate Creek Cove and Berners Bay.

3). The Lower Slate Lake tailings storage facility, docks, access road, and other mine facilities will impact the scenic character of Berners Bay for recreationists.

To address these issues, the Forest Service developed alternatives to the Proposed Action, as described above.

A Notice of Availability of the Draft SEIS was published January 23, 2004 in the Federal Register (Vol. 69, No. 15, Page 3340-3341) and copies of the document distributed to interested and affected parties. A public meeting was held on February 24, 2004 at Centennial Hall in Juneau and on February 26, 2004 at the American Bald Eagle Foundation Building in Haines. The extended comment period for the Draft SEIS closed April 7, 2004. Based on comments to the Draft SEIS, Alternative D was developed. The only new component introduced in Alternative D was a reverse osmosis water treatment facility to address concerns about the TSF effluent meeting NPDES permit limitations intended to protect downstream water quality in East Fork Slate Creek below the TSF.

Planning Record

The planning record for this project includes the Draft SEIS, Final SEIS, appendices, public comments, response to public comments, Forest Plan, all material incorporated by reference including the 1997 SEIS and ROD and 1992 EIS and ROD, and all

materials utilized during the analysis of this project. The planning record is being compiled and will be available for review at the Juneau Ranger District office when legal notice of this decision is published in the Juneau Empire.

Findings Required by Law

Tongass Land and Resource Management Plan, 1997

All project alternatives are consistent with the 1997 Land and Resource Management Plan for the Tongass National Forest. The site is located within an area designated as Modified Landscape with a Minerals prescription. My decision to approve the amended plan of operations for the Kensington Gold Project as described in Alternative D is consistent with the intent of the Forest Plants long-term goals and objectives listed on pages 2-2 to 2-5. The project was designed in conformance with Forest Plan standards and incorporates appropriate Forest Plan guidelines for Modified Landscape with a Minerals prescription (Forest Plan, pages 3-135 to 3-136 and 3-151 to 3-157).

As part of the Kensington Gold Project analysis, three small Old-Growth Reserves (OGR) within the project area were reviewed by an interagency team . These OGRs are synonymous with the Old-Growth Habitat land use designation in the Forest Plan. A non-significant amendment expands the OGRs in VCUs 160, 190, and 200 to meet the requirements of the Forest Plan. (ROD, Appendix 1)

The Roadless Area Conservation Rule (Roadless Rule)

On January 12, 2001 the Forest Service published a final rule for roadless area conservation known as the "Roadless Rule", which generally prohibited commercial timber harvest and road construction within inventoried roadless areas on national forests. In December 2003, the Forest Service exempted the Tongass National Forest from the roadless rule.

Alaska National Interest Lands Conservation Act (ANILCA)

An ANILCA Section 810 subsistence evaluation was conducted. The Kensington Gold Project is located within the City and Borough of Juneau, whose residents are non-rural for subsistence purposes in terms of the ANILCA. Documented subsistence use of the area is limited to the some fishing off Comet Beach by Skagway and Haines residents. The documented use of the project area by rural residents is well below the levels considered for subsistence use. Therefore, no significant restrictions on subsistence resources would be expected by implementing any of the alternatives..

Endangered Species Act

No threatened or endangered species either occur upon or would be affected by project components occurring on NFS land and approved by my decision. The Forest Service has determined that project components occurring outside of NFS land are not likely to affect threatened and endangered species. As indicated above, formal consultation with the NMFS is ongoing, and implementation of my decision is subject to the completion of this process. The USACE retains the full authority to deny or condition the ac-

tivities at the marine terminals in response to a biological opinion and any reasonable and prudent alternatives to protect listed species. Other agencies may, as a result of NMFS recommendations and fmdings, incorporate additional mitigations or modifications. Such mitigations and modifications will be incorporated within the permits of agencies with jurisdiction. The Final Biological Assessment/ Biological Evaluation (BA/BE) submitted to NMFS on November 17, 2004 is included as Appendix J to the SEIS and contains current and expected operating conditions. In the event that other mitigation measures or operating conditions are incorporated, I will review my decision to determine whether any changes are needed.

Essential Fish Habitat

The potential effects of the Kensington Gold Project on essential fish habitat (EFH) have been evaluated. No adverse effects to freshwater EFH will occur as a result of my decision. Although the risk of measurable impact on essential fish habitat has been minimized, I have determined that this project could adversely affect essential fish habitat in the marine environment. Marine components of this project could have short- and long-term adverse effects on EFH. These components will be addressed by other Federal, state, and local agencies that may require mitigation measures to reduce adverse impacts to EFH. In addition, Coeur is sponsoring a monitoring plan by NMFS and the state to assess the effects of petroleum releases into Berners Bay. I will continue to work with the NMFS in evaluating monitoring results. For specific information regarding essential fish habitat and potential impacts refer to sections

4.9 and 4.10, and the EFH Assessment included as Appendix B in the SEIS.

National Historic Preservation Act

A cultural resource survey of the area of potential effect for the Kensington Gold Project was completed in 2003, in compliance with Section 106 of the National Historic Preservation Act. Determinations of eligibility for 43 historic sites within the area of potential effect were submitted to the State Historic Preservation Officer for its concurrence with our determinations of eligibility. In March 2004 the Forest Service completed the determinations of effect for each of the historic properties in each of the proposed alternatives. A mitigation plan to address the adverse effects to historic properties has been documented in a Memorandum of Agreement (MOA) between Coeur Alaska Inc., Alaska State Historic Preservation Officer, and the Tongass National Forest as executed by the Forest Service on November 29, 2004 (FS No. 05MU-111005-017).

Implementation of this MOA during all phases of the mining operations, through closure, evidences that the Tongass National Forest has satisfied its section 106 responsibilities for all undertakings pursuant to the plan of operations.

The area of potential effect was also evaluated for the presence of any Traditional Cultural Properties (TCP). The State Historic Preservation Officer concurred with our determination of "No Traditional Cultural Properties Affected". Members of the Auk Kwaan were consulted regarding TCP in a May 2003 meeting in Juneau in order to complete and verify Forest Service records.

Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) requires that the Forest Service, when conducting or authorizing activities or development be consistent with the approved Alaska Coastal Management Program (ACMP) to the maximum extent practicable. This activity is one authorized under a Forest Service permit, as defined in 15 CFR 930.51(a). The Forest Service/State of Alaska Memorandum of Understanding on Coastal Zone Management Act/Alaska Coastal Management Program Consistency Reviews (MOU) lists permitted activities normally requiring a consistency determination (MOU, Section 302.8.2.). This activity is listed in Section 302.8.2 as normally requiring a consistency determination. Coastal Project Questionnaires have been completed by Coeur Alaska, and submitted to the State of Alaska for a consistency determination. A consistency determination must be received before the state can issue any permits and before the Forest Service can approve the plan of operations.

Executive Orders

Executive Order 11988 (Floodplain Management)

This area is not located within floodplains as defined by executive order 11988.

Executive Order 11990 (Protection of Wetlands)

Because wetlands are s extensive in the Kensington Gold Project area, it is not feasible to avoid all wetland areas. I have determined that the selected alternative includes all reasonable measures to minimize harm to wetlands, which may result from

such use. A separate permit, issued by the USACOE, is required for all wetland fill. The selected alternative eliminates the permanent loss of 122 acres of wetlands resulting from construction of the DTF. Construction of the TSF will impact 23 acres of wetlands, however, a similar amount of wetlands are expected to develop naturally or be created along the edges of Lower Slate Lake upon the completion of reclamation.

Executive Order 12898
(Environmental Justice)

Implementation of this decision will not result in disproportionate adverse human health or environmental effects to minority or low-income populations.

Executive Order 12962
(Recreational Fisheries)

With the application of Forest Plan standards and guidelines, including those for riparian areas, no significant adverse effects to freshwater or marine fisheries will occur. Most recreational fishing throughout the Tongass National Forest occurs by boat in saltwater, and any adverse effects would be minimal.

Executive Order 13175
(Indian Tribal Governments)

The Forest Service conducted consultations with the Chilkoot Indian Association, Chilkat Indian Village, and the Tlingit-Haida Central Council, as well as regional corporations, on the proposed project.

Executive Order 13186
(Migratory Birds)

Implementation of this decision will not have any significant adverse effects to migratory birds and their habitat. (SEIS Appendix H)

Process for Change During Implementation

Proposed changes to the authorized project actions will be subject to the requirements of National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Section 810 of Alaska National Interest Lands Conservation Act (ANILCA), Coastal Zone Management Act (CZMA), 36 CFR 228 (Subpart A), and other laws concerning such changes.

In determining whether and what kind of NEPA action is required, the Forest Supervisor will consider the criteria set forth in the Code of Federal Regulations (40 CFR 1502.9(c)), and FSH 1909.15, sec. 18, for determining whether to supplement an existing EIS. In particular, the Forest Supervisor will determine whether the proposed change is a substantial change to the Selected Alternative as planned and already approved, and whether the change is relevant to environmental concerns. Connected or interrelated proposed changes regarding particular areas of specific activities will be considered together in making this determination. The cumulative impacts of these changes will also be considered.

The intent of field verification is to confirm field conditions and to determine the feasibility and general design and location of a structure or road, but not to designate final locations. Minor adjustments are expected during implementation to better meet on-site resource management and protection objectives.

Many of these minor changes will not present sufficient potential impacts to require any specific documentation or other action to comply with applicable laws. Some minor changes may still require appropriate analysis and documentation to comply with FSH 1909.15, sec. 18.

Implementation of this Decision

Implementation of decisions subject to appeal pursuant to 36 CFR part 215, may occur on, but not before, 5 business days from the close of the appeal filing period.

Right to Appeal

This decision is subject to administrative review (appeal) pursuant to 36 CFR Part 215. Individuals or organizations who submitted substantive comments during the comment period specified at 215.6 may appeal this decision. The notice of appeal must be in writing, meet the appeal content requirements at 215.14 and be filed with the Appeal Deciding Officer:

Denny Bschor, Regional Forester
USDA Forest Service, Region 10
P.O. Box 021628
Juneau, AK 99802-1628

E-mail: appeals-alaska-regional-office@fs.fed.us

The Notice of Appeal, including attachments, must be filed (regular mail, fax, e-mail, express delivery or messenger service) with the Appeal Deciding Officer at the correct location within 45 calendar days of publication of notice of this decision in the Juneau Empire, the newspaper of record for the Tongass National Forest. The publication date in the newspaper of record is the exclusive means for calculating the

time to file an appeal. Those wishing to appeal this decision should not rely upon dates or timeframe information provided by any other source.

Hand delivered appeals will be accepted at the Regional Office in Juneau, Alaska during normal business hours (8:00 am through 4:30 pm) Monday through Friday, excluding holidays.

In accordance with 36 CFR Part 215.14, it is the responsibility of those who appeal a decision to provide the Appeal Decision Officer sufficient evidence and rationale to show why the Responsible Official's decision should be remanded or reversed. The written notice of appeal filed must meet the following requirements:

1. State the document is a Notice of Appeal filed pursuant to 36 CFR part 215;
2. List the name, address, and telephone number of appellant;
3. Identify the decision document by title and subject, date of the decision, and name and identify the specific change(s) in the decision that the appellant seeks or portion of the decision to which the appellant objects;
4. State how the Responsible Official's decision fails to consider comments previously provided, either before or during the comment period specified in 36 CFR 215.6 and, if applicable, how the appellant believes the decision violates law, regulation, or policy.

Contact Person

For additional information concerning this decision or the Forest Service appeal process, contact

Pete Griffin
Juneau District Ranger
8465 Old Dairy Road
Juneau, Alaska 99801(907) 586-8800

/s/Forrest Cole 12.9.04

FORREST COLE Date

Forest Supervisor

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Appendix 1
Non-significant amendment to Forest Plan

SIGNIFICANCE ANALYSIS FOR A NON-SIGNIFICANT AMENDMENT TO THE FOREST PLAN

Small Old-Growth Reserve (Habitat) Modifications in Value Comparison Units 160, 190, and 200

During the development of the *1997 Forest Plan Final Environmental Impact Statement*, a conservation strategy was designed to ensure that implementation of the Forest Plan would provide a reasonable assurance of maintaining viable and well-distributed wildlife populations across the Tongass National Forest for 100 years. As part of this conservation strategy, a forest-wide system of large, medium, and small Old-Growth Habitats or Reserves (OGRs) was established and a set of standards and guidelines developed to preserve the integrity of the forest's old-growth ecosystem. The habitats have been identified and mapped in the 1997 Forest Plan.

The Old-Growth Habitat land use designation provides for evaluation and possible adjustment of the location of the habitats based on site-specific information. Where feasible, the boundaries should follow geographic features so that they can be recognized in the field. The 1997 *Forest Plan Record of Decision* committed the Forest Service to work with the Alaska Department of Fish and Game (ADG&G) and the U.S. Fish and Wildlife Service (USFWS) to review the location, size, and suitability of the OGRs during project-level planning.

As part of the Kensington Gold Project analysis, three small OGRs were identified within the project area (Figure 1). Small OGRs require a contiguous landscape of at least 16 percent of the total Value

Comparison Unit (VCU) area and 50 percent of this area must be productive old-growth timber. Along with the general criteria of size and productivity, connectivity is also a criterion. The design of each habitat should be based on wildlife concerns specific to the area. Criteria commonly used in designing small habitats include important deer winter range, probable goshawk nesting habitat, probable marbled murrelet nesting habitat, large forest blocks, rare plant associations, and landscape linkages. VCUs are distinct geographic areas encompassing one or more large stream systems with boundaries that follow watershed divides.

The study area includes three VCUs (160, 190, and 200) with a small OGR within each. The Forest Service, ADF&G, and USFWS conducted an interagency review of the existing mapped small OGRs in November 2003. The review team determined that none of the mapped small OGRs in the study area met the requirements for size or the amount of productive old growth established under the Forest Plan and recommended non-significant modifications to each of the small OGRs. The findings and recommendation of the interagency review team are summarized below by VCU and explained in more detail in Appendix F of the *2004 Kensington Gold Project Supplemental Environmental Impact Statement* (SEIS).

VCU 160

Finding: The small OGR in VCU 160 does not meet Forest Plan standards and guidelines for size. This small OGR covers 802 acres and is 573 acres short of the 16 percent of VCU requirement.

Recommendation: Increase the size of the small OGR in VCU 160. The redrawn boundaries of this OGR

will border but not include the tailings storage facility, access roads, pipeline, and maintenance access facilities.

VCU 190

Finding: The small OGR in VCU 190 does not meet the Forest Plan standards and guidelines for size nor percentage of productive old growth (POG) needed. This small OGR covers 1,299 acres and is 106 acres short of the 16 percent of VCU requirement. Existing POG is 615 acres; 106 acres short of the 50 percent POG requirement.

Recommendation: Expand to the north in light of existing natural fragmentation and limited amounts of productive old growth.

VCU 200

Finding: The small OGR within VCU 200 does not meet the Forest Plan standards and guidelines for productive old growth. Existing POG is 648 acres; 227 acres short of the 50 percent POG requirement.

Recommendation: Due to the naturally fragmented area, additional acres were used in the adjacent VCU160. Appendix K of the Forest Plan allows for up to 30 percent of an OGR to be mapped in an adjacent VCU if the resulting habitat achieves the objectives of the old-growth habitats. The interagency review team agreed that expanding the small OGR in VCU 200 to include portions of VCU 160 would increase connectivity values, capture important beach and estuary fringe habitats and riparian habitats, and include higher-volume stands. The approximately 36 percent of the recommended modified OGR would extend into VCU 160.

The. Secretary of Agriculture's implementing regulation indicates the determination of significance is to be "...based on an analysis of the objectives, guidelines and other contents of the forest plan" (36 CFR 219.10(f)). The Forest Service has issued guidance for determining what constitutes a "significant amendment" under the National Forest Management Act. This guidance, in Forest Service Handbook (FSH) 1909.12 - Chapter 5.32, identifies four factors to be used in determining whether a proposed change to a forest plan is significant or not significant. These four factors are (1) timing; (2) location and size; (3) goals, objectives, and outputs; and (4) management prescriptions. An analysis of the factors is presented below.

Timing – The Tongass Forest Plan Revision was completed in 1997. The Old-Growth Habitat land use designation provides for evaluation and possible adjustment of the location of the habitats based on site-specific information. Project level analysis for the Kensington Gold Project in 2003 determined that existing OGRs in the study area did not meet Forest Plan standards and guidelines.

Location and Size – These modifications increase the size of three small OGRs to meet Forest Plan standards and guidelines and better preserve areas of old-growth forest and their associated natural ecological processes to provide habitat for old-growth associated resources. OGRs in VCUs 160, 190, and 200 will be increased in size by 652,163, and 458 acres, respectively.

Goals, Objectives, and Outputs – The boundary modifications approved here will increase the connectivity from higher elevations to the beach and estuary fringe habitats and additional riparian habi-

tat, and would increase the number of intact patches of medium- and high-volume old-growth stands. Maintaining forested corridors between OGRs or other non-development land use designations is a key component to maintaining viable wildlife populations on the forest.

Management Prescriptions

These recommendations would move 1,615 acres of productive old growth in land use designations suitable for timber harvest, into OGRs unsuited for timber harvest. Table A¬1 summarizes the cumulative effects of small OGR adjustments on the Forest to date. Individually and cumulatively the changes to acres suitable for timber harvest are minor.

Table A-1
Effects of Forest Plan Amendments on Acres Suitable for Timber Harvest as of December 2004

Project	Non-development to Development LUD Suitable Acres	Development to Non-development LUD Suitable Acres	Net Change in Suitable Acres
Kensington Gold EIS	0	1,615	-1,615
Madan EIS	377	1,501	-1,124
Finger Mountain EIS	0	593	-593
Cholmondoley EIS	894	6,873	-5,979
Woodpecker EIS	180	130	+50
Polk Small Sales EA	0	153	-153
Threemile EIS	458	826	-368
Fire Cove Salvage	186	633	-447
Salty EA	99	126	-27
Luck Lake EIS	257	794	-537
Doughnut EIS	0	19	-19
Kuakan EIS	416	542	-126
Sea Level EIS	185	500	-315
Canal Hoya EIS	0	151	-151
Chasina EIS	0	78	-78
Control Lake EIS	446	142	+304
Crystal Creek EIS	481	1,153	-672
Nemo Loop EA	177	932	-755
Todahl Backline EA	2	363	-361
Niblack EA	252	0	+252
Total	**4,700**	**17,759**	**-13,059**

Conclusion

Based on the analysis and recommendations of the interagency review team and the significance analysis above, the OGRs within VCUs 160, 190, and 200 will be modified as described in Appendix F of the 2004 Kensington Gold Project SEIS and shown in Figure 2. No direct or indirect effects on OGR is expected other than the positive effect of adjusting the boundaries of the existing small OGRs to comply with Forest Plan standards and guidelines. This amendment is fully consistent with current Forest Plan goals and Objectives.

This analysis in combination with the 2004 Kensington Gold Project SEIS and ROD document my decision to amend the Forest Plan with a non-significant amendment expanded OGRs in VCUs 160, 190, and 200.

/s/Forrest Cole _____ 12.9.04

FORREST COLE
Forest Supervisor

Date

APPENDIX K

RECLAMATION AND CLOSURE PLAN FOR THE KENSINGTON GOLD PROJECT

Coeur Alaska, Inc.
Juneau, Alaska

Prepared by:

KC Harvey, LLC
Bozeman, Montana

May 5, 2005

1.0 INTRODUCTION

The Kensington Gold Project (Project) is a proposed underground gold mine located approximately 45 miles north of Juneau in Southeast Alaska (Figure 1). The project covers both private lands managed by the Alaska Department of Natural Resources (ADNR) and public lands managed by the United States Forest Service (USFS). Coeur Alaska, Inc. (Coeur), a wholly owned subsidiary of Coeur d'Alene Mines Corporation, is the operator.

This reclamation and closure plan has been prepared in response to the Final Supplemental Environmental Impact Statement (SEIS) and Record of Decision (ROD) published by the U.S. Department of

Agriculture, Forest Service in December 2004. This plan addresses conceptual reclamation principles and facility-specific reclamation plans that are required as part of the Plan of Operations (POO) for closure of the property. This plan reflects the alternative chosen in the Final SEIS ROD and includes comprehensive cost estimates to be used for bonding purposes. The plan incorporates key reclamation, closure and monitoring requirements described in the Final SEIS ROD, and individual, applicable permits for the project. This updated reclamation plan and reclamation cost estimate also serves as the basis for establishing a financial mechanism for the site to ensure that the initial reclamation and long-term operating and monitoring costs are guaranteed.

The major components associated with the Project are an underground mine, mill site, a tailings storage facility (TSF), two waste rock repositories, borrow areas, an administrative office, maintenance and generator facilities, and a marine dock facility (Figure 2). Ancillary facilities include access roads, topsoil stockpiles, diversion systems, a wastewater facility, water supply, and other minor facilities.

The focus of the project is underground mining of a mesothermal gold deposit. The mine's life is estimated to be approximately 10 years, at a production rate of approximately 2,000 tons of ore and 400 tons of underground development rock (waste rock) per day.

The mine would be accessed through the existing 800 Level portal and a newly defined portal (1,000 Level Portal) on the Jualin side of the project (Figure 2). Mined ore would be hauled or conveyed to the process facilities adjacent to the Jualin Portal. Processing of the ore would consist of a flotation circuit produc-

ing a concentrate from the diorite host rock. The flotation tailings would be slurried by gravity through a pipeline to the proposed tailings storage facility (TSF) located at Lower Slate Lake (Figure 2). The bathymetry of the lake is conducive to the conventional slurried disposal of tailings behind an embankment, and allows for the reestablishment of the lake at closure.

Mining would occur 365 days per year; year-round processing would occur over the estimated 10-year life of the mine. Site reclamation and closure tasks are expected to generally be completed two years after cessation of all mining activities. The schedule for completing the physical reclamation is discussed in Appendix A.6. Some project facilities will remain during the ....

* * * * *

3. Establishment of long-term, self-sustaining vegetation communities by reseeding with native plants and promoting natural invasion (recolonization) and succession;

4. Protection of surface and ground water quality including compliance with all water quality standards at closure;

5. Protection of public health by reducing potential hazards typically associated with mines and processing facilities;

6. Establishment of fisheries and wildlife habitat and recreational resources; and

7. Minimization of long-term closure requirements, especially for ongoing care and maintenance.

Coeur has incorporated sound engineering principles in this reclamation plan to achieve these goals and uses.

2.2 Summary of Final SEIS Reclamation Requirements

Based on the analysis and evaluation in the Final SEIS for the Kensington Gold Project, the USFS made the decision to select Alternative D for mining and reclamation, as documented in the ROD. Alternative D requires that the reclamation plan be revised (this document) to encompass the activities described in the Final Plan of Operations. This section of the revised reclamation and closure plan summarizes the general reclamation requirements under Alternative D, as described in the SEIS. This summary reflects current mining, mitigation and reclamation plans described in the Final Plan of Operations.

The first step in reclamation would involve the removal and storage of growth media from all areas to be disturbed. Stockpiled growth media would be seeded to reduce the potential for erosion during storage.

Final reclamation would begin at the final stages of mining operations. Facilities not necessary for the reclamation process, including storage tanks and buildings, would be decommissioned and either salvaged or demolished. These materials would be removed from the site. After facilities were removed, concrete pads would be broken into pieces and covered with fill material. Compacted areas (excluding the buried concrete pads) would be ripped, and all areas would be graded to blend with the surrounding natural topography. Roads would remain in place as long as required to conduct monitoring activities.

Closure and reclamation of all roads on the Kensington side would include removing culverts, ripping the road surface, and contouring the cut-and-fill slopes to blend with the surrounding terrain. Stream crossings would be returned to their original condition, and bridges and culverts would be removed if they were determined not to be necessary for post-closure access. The access road from Slate Creek Cove to the Jualin Mine site could remain in place under RS 2477. All piers, decking, and pilings would be removed from the Slate Creek Cove marine terminal. The fill within the tideland lease area is expected to have recolonized naturally and removal may not be required. The fill will be removed as is necessary under the State of Alaska tideland lease. This issue will be evaluated prior to closure and addressed in the final closure plan. For the purpose of bonding removal of the fill was included in this plan.

Later stages of final reclamation would include the removal of stormwater diversions and sedimentation ponds, followed by regrading and revegetation. The final stages of reclamation would include removal of the remaining structures and covering the mine portals with a steel grate. Growth media would be spread over regraded areas to a maximum depth of one-foot followed by seeding. The depth of growth media, plant species, and seed mixtures, as well as the use of fertilizer and soil amendments (e.g., lime), would be determined through the use of test plots developed during the life of the operation. Mulch and other BMPs would be used to minimize erosion until vegetation became established. A monitoring program would be established to track reclamation success (see Section 4.2).

The tailings access road would remain as long as necessary for maintenance and monitoring of the TSF, which is being bonded for 100 years.

The tailings in the Lower Slate Lake TSF would be deposited to an elevation of 704 feet with a water cover of at least nine feet. At closure, the lake level would be raised to an elevation at which the TSF would create or inundate at least the same acreage of natural sediment in shallow areas that support plant life and macroinvertebrates as was present in Lower Slate Lake before mining. The contingency water treatment system and diversion pipeline would continue to be operated, if needed, until the operator demonstrated that downstream water quality can be protected without the need for treatment. Once this was demonstrated to USEPA, ADEC, and the Forest Service, the treatment system and pipeline would be removed. A four- to-six-inch tailings cover/amendment is a contingency for reclamation of the TSF. Coeur Alaska will be conducting testing during mine operations to demonstrate the habitability of the tailings and if a cover/amendment is necessary.

The time required to implement the TSF reclamation plan, including establishing the final lake level, would vary depending on upstream flows and precipitation. Coeur Alaska would be required to continue to comply with minimum instream flows established by ADNR throughout the reclamation period.

The TSF reclamation would focus on restoring resident fish populations and would include a littoral zone, as well as areas deep enough for overwintering. The discharge from the reclaimed lake would occur through a spillway constructed in bedrock. The

spillway would be designed to handle runoff conditions and storm events as required by the State Dam Safety Engineer. A reconstructed channel from the spillway would be designed so that fish would be able to safely move down the system and into East Fork Slate Creek. The project operator would be required to establish a funding mechanism to ensure the long-term monitoring and maintenance of the tailings dam. The details of the funding and long-term plan would be established with the Dam Safety permit from the state. Financial assurance will also be established to ensure the overall site reclamation program is carried out to completion.

APPENDIX L

STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
Water Non-Point Source Pollution Control Program

Frank H. Murkowski, Governor
555 Cordova Street
Anchorage, AK 99501-2617
Phone: (907) 269-6281
Fax: (907) 269-7508
TTY: (907) 269-7511
http://www.state.ak.us/dec/

May 6, 2005

Certified Receipt Number
#7004 1160 0004 2848 6168
Return Receipt Requested

Rick Richins
RTR Resource Management, Incorporated
1109 W. Main Street
Boise, Idaho 83702

Subject: Lynn Canal 31 M, Kensington Mine
Reference No. POA-1990-592-M
State I.D. No. AK 0406-13J

Dear Mr. Richins:

In accordance with Section 401 of the Federal Clean Water Act of 1977 and provisions of the Alaska Water Quality Standards, the Department of Environmental Conservation is issuing the enclosed Certificate of Reasonable Assurance for the proposed development of new mine facilities and associated infrastructure within stale waters and wetlands, 45 miles northwest of Juneau, Alaska.

Since this certification also serves as a waste management and disposal authorization, it expires on May 5, 2010.

Department of Environmental Conservation regulations provide that any person who disagrees with this decision may request an adjudicatory hearing in accordance with 18 AAC 15.195 – 18 AAC 15.340 or an informal review by the Division Director in accordance with 18 AAC 15,185. Informal review requests must be delivered to the Director, Division of Water, 410 Willoughby Ave., Juneau 99801, within 15 days after receiving this certification. Adjudicatory hearing requests must be delivered to the Commissioner of the Department of -Environmental Conservation, 410 Willoughby Avenue, Suite 303, Juneau, Alaska 99801, within 30 days after the date of this certification. If a hearing is not requested within 30 days, the right to appeal is waived.

By copy of this letter we are advising the U.S. Army Corps of Engineers and the state Office of Project Management and Permitting of our actions and enclosing a copy of the certification for their use.

Sincerely,

SIGNATURE ON FILE
Ron Klein
Program Manager

Enclosure

CC: (with encl.)
John Leeds,
COE Juneau
Pete McGee,
ADEC Fairbanks
People who commented

EPA, AK Operations

F&WS

DNR/OPMP Juneau

STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
CERTIFICATE OF REASONABLE ASSURANCE

A Certificate of Reasonable Assurance, in accordance with Section 401 of the federal Clean Water Act and the Alaska Water Quality Standards, is issued to Coeur Alaska, Incorporated, 3031 Clinton Drive, Suite 202, Juneau, Alaska 99801, for the proposed placement of fill into approximately 61.7 acres of wetlands and waters, in the development of mining facilities and associated infrastructure. The purpose of this filling is to relocate the major mine components from the Kensington Mine in the vicinity of Comet Beach on Lynn Canal to the Jualin Mine (2 miles to the southeast) in the vicinity of Slate Cove. This is necessary in order to access the ore body from the Jualin side of the peninsula. This certificate also substitutes for, and serves as, a state integrated waste management and disposal authorization under 18 AAC 60.200(b) and AS 46.03.100(d). The department will enforce the terms and conditions of this certification in the same way that it would require compliance with a permit issued under 18 AAC 60 or 18 AAC 72 for the same activity.

The Tailing Disposal Facility (TDF) proposed to be constructed in Slate Creek will be considered a "disposal site" under federal law and policy (see 40 CFR § 230.3(i)), and is hereby authorized as a "treatment work" under state law (see AS 46.03.900(33)). Thus, State of Alaska water quality standards will not have to be met within that area. 18 AAC 70.010(c). Water discharged from the TDF shall meet NPDES permit limitations, and the receiving water, East

Fork Slate Creek, must meet state water quality standards.

Proposed facilities requiring said fill placement are listed in Table 1.

The proposed activity is located within Section 1, T36S, R61E; and Sections 10, 14, 15, 23, 24, 25, and 36, T35S, R61E, Copper River Meridian, on the west side of Berners Bay in the vicinity of Slate Creek Cove, 45 air miles northwest of Juneau, Alaska.

Public notice of the application for this certification was given as required by 18 AAC 15.180.

Water Quality Certification is required under Section 401 because the proposed activity will be authorized by a Corps of Engineers permit, reference number POA-1990-592-M, and a discharge may result from the proposed activity.

Table 1 - Kensington Gold Project – – Facility Acres

Area	Facility Description	Status	Acres of Waters of the U.S.**	Fill Volume***	Mechanical Land Clearing (acres)
1	Kensington Comet Beach Camp	Existing/ Permitted	0	0	0
2	Kensington Road	Permitted	(0.9)	0	0
3	Kensington Borrow Source	Proposed Expansion	(0.3)	0	0.3
4	Kensington Development Rock Storage	Existing/ Permitted	(5.1)	(500,000)	0
5	Kensington Water Treatment Plant/ Ponds	Existing/ Permitted	(2.6)	(20,000)	0
6	Kensington Top-soil Stockpile Area	Permitted	(2.1)	(30,000)	2.1
7	Kensington 2050 Waste Rock Dump	Existing	0	0	0
8	Jualin Process Area	Proposed	1.1	21,000	1.1
9****	Jualin Develop-ment Rock Storage	Proposed	4.3	100,000	4.3
10	Jualin Process Area Treatment Pond	Proposed	0	(20,000)	0
11	Jualin Process Area-Topsoil Stockpile	Proposed	0	(10,000)	0.3
12	Jualin Pumphouse Area	Proposed	0.1	0	0.1
13	Jualin Access Road	Proposed Expansion	8.2	26,000	8.2
14	Jualin Laydown Area #1	Existing	(0.4)	(4,800)	0
15	Jualin Laydown Area #2	Proposed	(3.5)	0	3.5
16	Jualin Laydown Area #3	Existing	(0.8)	0	0
17	Jualin Admini-stration Area	Existing	(2.5)	(32,000)	0
18	Jualin Borrow Source #1	Proposed Expansion	0	0	0
19	Jualin Borrow Source #2	Proposed Expansion	(0.1)	0	0.1
20	Jualin Borrow Source #3	Proposed Expansion	(2.4)	0	2.4

Area	Facility Description	Status	Acres of Waters of the U.S.**	Fill Volume***	Mechanical Land Clearing (acres)
21	Jualin Borrow Source #4	Proposed	(0.7)	0	0.7
22	Tailings Facility Access Road & Pipeline	Proposed	4.7	20,000	4.7
23	Tailings Facility Access Road	Proposed	0.3	2,000	0.3
24	Tailings Lake (tailings as fill)	Proposed	23.5	3,168,000	23.5
25	Tailings Lake Margin Working Area	Proposed	8.25	450	8.25
25a	Tailings Lake Water Treatment Plant	Proposed	0.24	1000	0.24
25b	Tailings Lake Diversion Pipe Intake Dam	Proposed	0.01	25	0
26	Tailings Dam Borrow Source	Proposed	(0.3)	0	0.3
27	Tailings Pipeline and Access Road	Proposed	3.0	15,000	3.0
28	Tailings Dam and Plunge Pool Area	Proposed	5.9	120,000	0
29	Slate Creek Cove Marine Terminal	Proposed	1.9	10,475	1.9
30	Slate Creek Cove Topsoil Stockpile	Proposed	0.2	4,000	0.2
TOTALS			**61.7**	**3,487,950**	**65.49**

**Areas in parentheses are existing, permitted, or have no fill associated with the disturbance to wetlands

***Fill volumes in parentheses are existing or have been previously permitted

****Of the proposed facilities in this amendment, this is the only facility which will not be reclaimed as wetlands

Having reviewed the application and comments received in response to the public notice, the Alaska Department of Environmental Conservation certifies that there is reasonable assurance that the proposed activity, as well as any discharge which may result, will comply with applicable provisions of Section 401 of the Clean Water Act and the Alaska Water Qual-

ity Standards, 18 AAC 70, provided that the following conditions are adhered to.

1. The permittee shall submit mine operations, water quality monitoring, and closure plans to the department for its approval before introducing any discharge into the TDF and shall secure department approval for any modification to approved plans.

2. During construction of the tailings dam the construction area shall be isolated from the flowing waters. Techniques such as stream diversion, dam and pump, or stream fluming shall be incorporated into the construction activity to insure that silt laden water resulting from construction activities is not carried downstream and to marine waters.

3. All soil disturbing construction operations that would increase turbidity of surface waters to levels that would violate Alaska Water Quality Standards shall be temporarily suspended if on site monitoring demonstrates said violations.

4. For culverts which carry waters that are discharging or will discharge into fish-bearing fresh waters or marine waters, installation shall not occur within the flowing waters of the stream/drainage. Culvert installation techniques such as stream diversion, dam and pump, or stream fluming shall be incorporated into the installation activity to insure that silt laden water is not carried into sensitive fish habitat. DNR Habitat permits shall address the anadromous fish-bearing streams.

5. Any disturbance in the stream banks or streambed areas shall be stabilized to prevent erosion and resultant sedimentation of the water body during and after operations. Any disturbed areas shall be re-contoured and revegetated as soon as practicable.

6. During the construction and operational phases, spill response equipment and supplies shall be available on site for the cleanup and containment of petroleum product leaks or spills.

7. The wooden portions of the terminal docking shall not be treated with a preservative containing pentachlorophenol and if treated with creosote, the creosote shall be applied via pressure treatment that inhibits leaching at a rate that causes a sheen to form on the water.

8. The mine tailings shall be tested on a quarterly basis, in accordance with a monitoring plan approved by the department, to insure there are no significant deviations from the original tailings analysis which may affect monitoring, closure requirements, water quality, or any other permit condition. Constituent levels that shall be measured include, but are not limited to, aluminum, ammonia, arsenic, cadmium, chromium, copper, iron, lead, mercury, nickel, nitrate, pH, selenium, silver, sulfate, total dissolved solids (TDS), zinc, meteoric water mobility, and acid base accounting. These analyses shall be included in the annual report to the U.S. Forest Service for all agencies to review.

9. Untreated runoff from the topsoil stock pile shall not be allowed to reach any natural body of water.

10. Construction of the infiltration gallery shall be isolated from the flowing waters of the stream.

11. Intertidal fill placed for the marine terminal shall be clean of organics. Fill shall be placed during low tide in those intertidal areas which are dry during low tide.

12. The appropriate water quality protection BMPs shall be utilized during the proposed timber harvest around Lower Slate Lake, to protect the waters of the lake, stream, and ocean.

13. Bridge abutment construction shall be isolated from the flowing waters of the stream.

14. Coeur Alaska, Inc., shall provide proof of financial responsibility in an amount and in form[s] acceptable to the Department, in accordance with AS 46.03.100(f) and 18 AAC 60.265. If the financial assurances provided to other state and federal agencies are not sufficient to satisfy the Department's requirements, Coeur Alaska, Inc. will provide any additional financial assurances determined by the Department to be necessary.

15. Capping of the tailings, addition of organics, or other state approved mitigation measures will be required at or after mine closure if water quality criteria are not met in the impoundment, or if the tailings do not successfully re-colonize as determined by the state.

Date **May 6, 2005**

SIGNATURE ON FILE

Ron Klein
Program Manager

APPENDIX M

DEPARTMENT OF THE ARMY PERMIT

ENG FORM 1721, Nov 86 EDITION OF SEP 82 IS OBSOLETE (33 CFR 325 (Appendix A))

Permittee: COEUR ALASKA, INCORPORATED

Permit No.: POA-1990-592-M, LYNN CANAL 31

Issuing Office: U.S. Army Engineer District, Alaska

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

Project Description: Dredge, place structures, and discharge an approximate total of 3,487,950 cubic yards of fill and dredged fill materials into an approximate total of 61.7 acres of waters, including forested and scrub shrub wetlands, deep-water habitat, and into other waters, and navigable waters of the United States (U.S.), in conjunction with the construction of new mine facilities and associated infrastructure, as described in the attached Tables 1 and 2, and drawings, 12 sheets, dated April 2005. Approximately 65.49 acres of U.S. waters will be mechanically land cleared, prior to excavation and/or construction activities.

All work will be in accordance with the attached Tables 1 and 2, and drawings (14 sheets, dated April 2005).

The following action authorized May 6, 1998, by Department of the Army (DA) permit POA-1990-592-2 (2-90059), is hereby eliminated from DA authorization:

> "Mechanized land clearing, followed by the excavation of wetlands, and the placement of fill to construct the base, containment and drain structures for the dry tailings storage facility (DTF), a footprint of 113 acres in wetlands."

Project Location: The project site is located within Section 1, Township 36 South, Range 61 East; and Sections 10, 14, 15, 23 through 25, and 36, Township 35 South, Range 61 East, Copper River Meridian; USGS Quadrangle Juneau D-4; Latitude 58°46'56" North, Longitude 134°00'36" West; north of Juneau, Alaska.

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on **30 June 2008**. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party

in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and State coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished In accordance with the terms and conditions of your permit.

Special Conditions:

SEE ATTACHED LIST OF PERMIT CONDITIONS

Special Information:

Any condition incorporated by reference into this permit by General Condition 5, remains a condition of this permit unless expressly modified or deleted, In writing, by the District Engineer or his authorized representative.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, State, or local authorization required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the Information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a revaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fall to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209:170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General Condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

/s/Timothy J. Gallagher _____ June 17, 2005
(DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below,

/s/Larry L. Reeder — June 17,2005

FOR: (DISTRICT ENGINEER) — (DATE)
Colonel Timothy J. Gallagher
Larry L. Reeder, Chief
Regulatory Branch

When the structures or work authorized by this permit are still in existence at the time the property is transferred the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions have the transferee sign and date below.

(TRANSFEREE) — (DATE)

Special Conditions for Corps Permit

POA-1990-592-M

FAILURE TO COMPLY WITH CORPS OF ENGINEERS PERMIT CONDITIONS MAY BE GROUNDS TO MODIFY, SUSPEND, OR REVOKE THE DEPARTMENT OF THE ARMY PERMIT

GENERAL

1. Any condition incorporated by reference into this permit by Special Condition or by General Condition 5, remains a condition of this permit unless expressly modified or deleted, in writing, by the District Engineer or his authorized representative.

2. The work limit for each mine component, in waters of the United States, shall be clearly identified in the field prior to excavation, clearing and/or construction. The fill limit boundaries shall be located and flagged prior to fill placement. Permanent markers shall be placed and monumented so an observer can delineate the clearing and fill limits while walking on the ground at the site.

3. Permittee shall be responsible to obtain all permits and comply with all appropriate State and Federal Statutes for oil storage and transfer. An oil storage facility shall be subject to the provisions of a plan of operation approved by the United States Coast Guard and Oil Spill Contingency Plan approved by the Alaska Department of Environmental Conservation.

4. Permittee shall provide an annual progress report to the Corps on project status. This report

shall summarize the wetland acres disturbed and reclaimed. The report will be due annually on or before February 15.

5. The permittee shall ensure that all project contractors and all workers whose work is subject to this permit are advised of its terms and conditions.

6. Permittee shall comply with the terms and conditions of the most recently approved version of the Kensington Gold Project's "*Final Plan of Operations*", to include "*Appendix I, Reclamation and Closure Plan*", as approved by the U.S. Forest Service. All measures involving concurrent and end-of-project reclamation in wetlands shall become enforceable conditions of the Department of the Army (DA) permit. The DA recognizes that the reclamation document is a 'living' document and will undergo many revisions between now and project closure, to comply with pertinent Federal, state and local regulations.

7. Permittee shall minimize tree clearing at the mine and mill complex and along the haul road, and shall maintain as large a buffer of standing timber as practicable between the haul road, the mill and the processing area at Berners Bay.

8. Permittee shall identify methods in the approved Plan of Operations and implement the best management practices that allow far quick action to be taken where erosion is imminent or under way.

9. Permittee shall reclaim disturbed areas on steep slopes and shall avoid disturbing steep slopes during inclement weather.

10. A nontoxic chemical flocculent shall be added to the slurry to enhance the deposition of suspended particles in the Lower Slate Lake disposal site [see CFR 230.71(d)].

FRESHWATER

11. A brush berm or equivalent shall be placed on the wetland permit boundaries down gradient of flow to keep sediment from leaving the project site. The berm footprint shall not exceed the approved permit boundary.

12. Natural drainage patterns shall be maintained in the project area by the installation of culverts in sufficient number and size under access roads to prevent flooding or excessive drainage of adjacent wetlands. The flood channels identified in the approved permit boundary in and around laydown yards and pads shall be clearly marked and shall remain undisturbed except as shown in the approved permit boundary.

13. No fill or construction materials will be stockpiled, temporarily or permanently, on adjacent wetlands or waters outside the approved footprint.

14. All surface disturbances in wetlands shall be confined to the project footprint to prevent unnecessary damage to adjacent wetland areas. No motorized equipment shall be operated, stored or serviced outside of approved areas. No fuel, lubricants, or other hazardous substances shall be stored below the Ordinary High Water level of Johnson Creek, Slate Creek, Ophir Creek or Sherman Creek, Upper Slate Lake, Lower Slate lake, or below the High Tide Line of Berners Bay or Lynn Canal.

15. Permittee shall construct a cofferdam in East Fork Slate Creek, to capture Upper Slate Lake waters and other waters and divert the water via a diversion pipeline past the Tailings Storage Facility (TSF) and into the East Fork Slate Creek segment located below the dam.

16. The waters and the discharged processed mine tailing sediments, located in Lower Slate Lake, shall be tested, at lake closure or just prior to cessation of discharges of mine wastes into Lower Slate Lake, in accordance with appropriate testing requirements (at the time of closure) for the presence of toxic materials and contaminants and the results shall be made available to the United States Army Corps of Engineers, Alaska District, Regulatory Branch, for dissemination to the appropriate State and Federal resource agencies.

17. Silt screens or other appropriate methods shall be used to confine suspended particles and turbidity to a small area where settling can occur in Lower Slate Lake (see 40 CFR 230.73(c)), and include filter blankets and curtains to filter out suspended solids.

18. No in-water work shall occur in Johnson Creek between May 1 through October 1, to direct construction to low-flow periods.

MARINE

19. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or

work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

20. All steel piles shall be driven using a vibratory hammer. Under those-conditions where impact hammers are required for reasons of seismic stability or substrate type, the piles shall be driven as deep as possible with a vibratory hammer prior to the use of the impact hammer. The impact hammer shall be used at a time of year when larval and juvenile stages of fish species are not present: this will be coordinated with the Alaska Department of Natural Resources, Habitat.

21. All piles shall be driven when the current is reduced (i.e., centered around slack current) to minimize the number of fish exposed to adverse levels of underwater sound.

22. Permittee shall either use a block of wood between the impact hammer and the pilings, and/or use a bubble curtain to attenuate the sound.

23. Permittee shall install and maintain, at their expense, any safety lights and signals prescribed by the U.S. Coast Guard (USCG) through regulations or otherwise, on the authorized marine facilities. The USCG can be reached at the following address and telephone number: Commander (oan) 17th Coast Guard District,

Post Office Box 25517, Juneau, Alaska 99802-5517, telephone (907) 463-2254.

24. The size of the fill footprint shall be restricted to minimize adverse environmental impacts to the Slate Creek Cove and Berners Bay ecosystem.

25. Permittee shall use metal grating as a top surface, rather than planking, as this results in greater light transmission to aquatic plants. Light penetration is needed to maintain intertidal habitat beneath structures such as walkways, catwalks, and gangways.

26. No portion of any floating structure may ground at any tidal stage.

27. No in-water work shall occur in Berners Bay between March 15 through June 30, to protect juvenile salmonids, herring and eulachon.

28. The placement of fill material into marine waters shall only occur during low-water periods.

29. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.

ALASKA DEPARTMENT OF CONSERVATON CERTIFICATION: The following conditions were listed on ADEC's Certificate of Reasonable Assurance, and in accordance with 33 U.S.C. 1341(d), are incorporated into the Department of the Army permit.

1. The permittee shall submit mine operations, water quality monitoring, and closure plans to the department for its approval before introducing any discharge into the TDF and shall secure department approval for any modification to approved plans.

2. During construction of the tailings dam the construction area shall be isolated from the flowing waters. Techniques such as stream diversion, dam and pump, or stream fluming shall be incorporated into the construction activity to insure that silt laden water resulting from construction activities is not carried downstream and to marine waters.

3. All soil disturbing construction operations that would increase turbidity of surface waters to levels that would violated Alaska Water Quality Standards shall be temporarily suspended if on site monitoring demonstrates said violations.

4. For culverts which carry waters that are discharging or will discharge into fish-bearing fresh waters or marine waters, installation shall not occur within the flowing waters of the stream/drainage. Culvert installation techniques such as stream diversion, dam and pump, or stream fluming shall be incorporated into the installation activity to insure that silt laden water is not carried into sensitive fish-habitat. DNR Habitat permits shall address the anadromous fish-bearing streams.

5. Any disturbance in the stream banks or streambeds area shall be stabilized to prevent erosion and resultant sedimentation of the water body during and after operations. Any disturbed areas shall be re-contoured and revegetated as soon as practicable.

6. During the construction and operational phases, spill response equipment and supplies shall be available on site for the cleanup and containment of petroleum product leaks or spills.

7. The wooden portions of road bridges and of the marine terminal shall not be treated with Any preservative containing or pentachlorophenol and if treated with creosote, the creosote shall be applied via pressure treatment that inhibits leaching at a rate that causes a sheen to form on the water.

8. The mine tailings shall be tested on a quarterly basis, in accordance with a monitoring plan approved by the department, to insure there are no significant deviations from the original tailings analysis which may affect monitoring, closure requirements, water quality, or any other permit condition. Constituent levels that shall be measured include, but are not limited to, aluminum, ammonia, arsenic, cadmium, chromium, copper, iron, lead, mercury, nickel, nitrate, pH, selenium, silver, sulfate, total dissolved solids (TDS), zinc, meteoric water mobility, and acid base accounting. These analyses shall be included in the annual report to the U.S. Forest Service for all agencies to review.

9. Untreated runoff from the topsoil stock pile shall not be allowed to reach any natural body of water.

10. Construction of the infiltration gallery shall be isolated from the flowing waters of the stream.

11. Intertidal fill placed for the marine terminal shall be clean of organics. Fill shall be placed during low tide in those intertidal areas which are dry during low tide.

12. The appropriate water quality protection BMPs shall be utilized during the proposed timber

harvest around Lower Slate Lake, to protect the waters of the lake, stream, and ocean.

13. Bridge abutment construction shall be isolated from the flowing waters of the stream.

14. Coeur Alaska, Inc., shall provide proof of financial responsibility in an amount and in form(s) acceptable to the Department, in accordance with AS 46.03.100(f) and 18 AAC 60.265. If the financial assurances provided to other state and federal agencies are not sufficient to satisfy the Departments requirements, Coeur Alaska Inc. will provide any additional financial assurances determined by the Department to be necessary.

15. Capping of the tailings, addition of organics, or other state approved mitigation measures will be required at or after mine closure if water quality criteria are not met in the impoundment, or if the tailings do not successfully re-colonize as determined by the state.

Table 1 - Kensington Gold Project –

Amendment to Permit # 2-900592 – Facility Acres

Area *	Facility Description	Status	Acres of Waters of the U.S.**	Fill Volume***	Mechanical Land Clearing (acres)
1	Kensington Comet Beach Camp	Existing/ Permitted	0	0	0
2	Kensington Road	Permitted	(0.9)	0	0
3	Kensington Borrow Source	Proposed Expansion	(0.3)	0	0.3
4	Kensington Development Rock Storage	Existing/ Permitted	(5.1)	(500,000)	0
5	Kensington Water Treatment Plant/ Ponds	Existing/ Permitted	(2.6)	(20,000)	0
6	Kensington Top-soil Stockpile Area	Permitted	(2.1)	(30,000)	2.1
7	Kensington 2050 Waste Rock Dump	Existing	0	0	0
8	Jualin Process Area	Proposed	1.1	21,000	1.1
9****	Jualin Develop-ment Rock Storage	Proposed	4.3	100,000	4.3
10	Jualin Process Area Treatment Pond	Proposed	0	(20,000)	0
11	Jualin Process Area-Topsoil Stockpile	Proposed	0	(10,000)	0.3
12	Jualin Pumphouse Area	Proposed	0.1	0	0.1
13	Jualin Access Road	Proposed Expansion	8.2	26,000	8.2
14	Jualin Laydown Area #1	Existing	(0.4)	(4,800)	0
15	Jualin Laydown Area #2	Proposed	(3.5)	0	3.5
16	Jualin Laydown Area #3	Existing	(0.8)	0	0
17	Jualin Admini-stration Area	Existing	(2.5)	(32,000)	0
18	Jualin Borrow Source #1	Proposed Expansion	0	0	0
19	Jualin Borrow Source #2	Proposed Expansion	(0.1)	0	0.1
20	Jualin Borrow Source #3	Proposed Expansion	(2.4)	0	2.4

Area *	Facility Description	Status	Acres of Waters of the U.S.**	Fill Volume***	Mechanical Land Clearing (acres)
21	Jualin Borrow Source #4	Proposed	(0.7)	0	0.7
22	Tailings Facility Access Road & Pipeline	Proposed	4.7	20,000	4.7
23	Tailings Facility Access Road	Proposed	0.3	2,000	0.3
24	Tailings Lake (tailings as fill)	Proposed	23.5	3,168,000	23.5
25	Tailings Lake Margin Working Area	Proposed	8.25	450	8.25
25a	Tailings Lake Water Treatment Plant	Proposed	0.24	1000	0.24
25b	Tailings Lake Diversion Pipe Intake Dam	Proposed	0.01	25	0
26	Tailings Dam Borrow Source	Proposed	(0.3)	0	0.3
27	Tailings Pipeline and Access Road	Proposed	3.0	15,000	3.0
28	Tailings Dam and Plunge Pool Area	Proposed	5.9	120,000	0
29	Slate Creek Cove Marine Terminal	Proposed	1.9	10,475	1.9
30	Slate Creek Cove Topsoil Stockpile	Proposed	0.2	4,000	0.2
TOTALS			**61.7**	**3,487,950**	**65.49**

*Areas are shown on Sheet 3 of 14

**Areas in parentheses are existing, permitted, or have no fill associated with the disturbance to wetlands

***Fill volumes in parentheses are existing or have been previously permitted

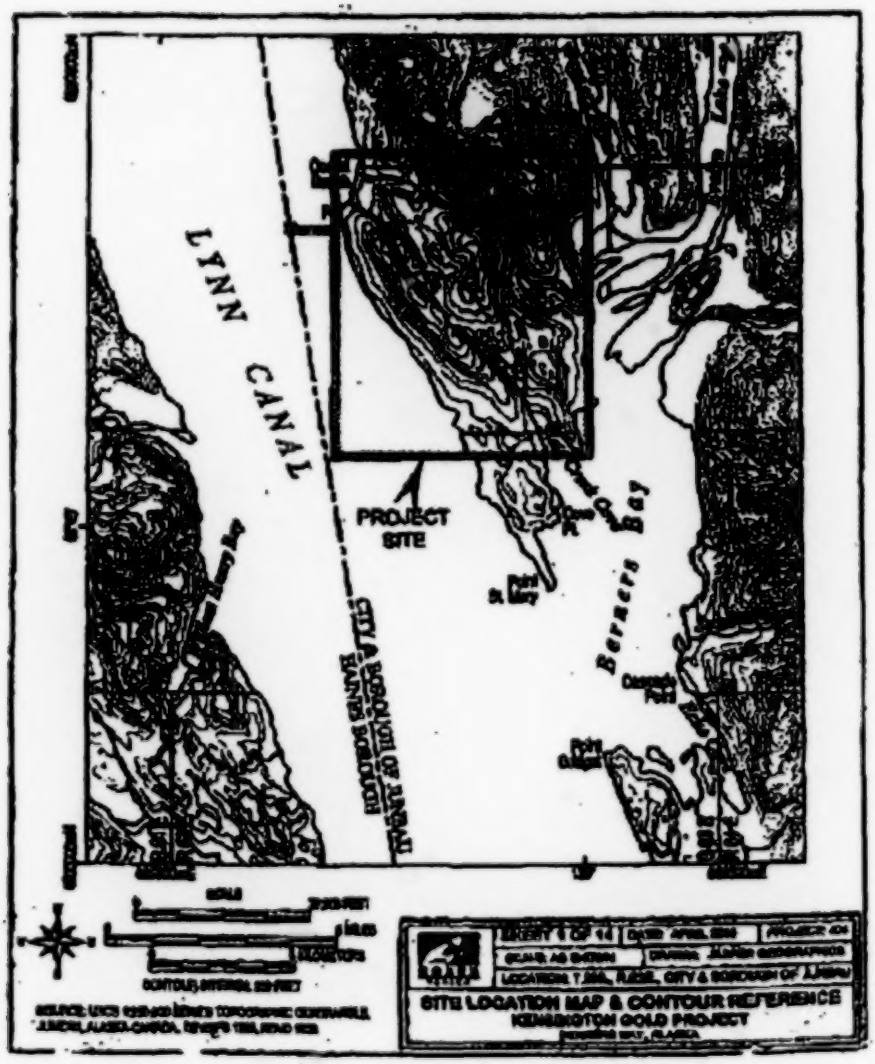
****Of the proposed facilities in this amendment, this is the only facility which will not be reclaimed as wetlands

Table 2 - Summary of Disturbed Areas and Wetlands

Parcel	Reclamation (acres)		
	Wetland - or open water	Upland	No Action
1 – Kensington Comet Beach Camp	0	3.2	0
2 – Kensington Road	7.6	0.5	0
3 – Kensington Borrow Source	1.5	0	0
4 – Kensington Development Rock Storage	0	14.3	0
5 – Kensington WTP/Ponds	4.3	0	0
6 – Kensington Snow/Topsoil Stockpile	2.1	0	0
7 – 2050 Level Portal Waste Rock Dump	0	0	1.5
8 – Jualin Process Area	0	0	12.9
9 – Jualin Development Rock Storage Area	0	4.3	0
10 – Jualin Process Area Treatment Pond	0	0	1.5
11 – Jualin Area Snow/Topsoil Stockpile	0	0.3	0
12 – Jualin Pumphouse Area	0	0	0.1
13 – Jualin Access Road	0	0	33.8
14 – Jualin Laydown Area #1	0.4	0	0
15 – Jualin Laydown Area #2	0	0	3.5
16 – Jualin Laydown Area #3	0	0	0.8
17 – Jualin Administration Area	0	0	2.5
18 – Jualin Borrow Source #1	0	2.0	0
19 – Jualin Borrow Source #2	0	1.3	0
20 – Jualin Borrow Source #3	3.6	0	0
21 – Jualin Borrow Source #4	0.7	0	0
22 – TSF Access Road and Pipeline	0	0	7.4
23 – Tailings Facility Access road	0	0	2.6
24 – Tailings Lake	61.8[1,2]	0	0
25 – Tailings Lake Margin Working Area	8.5	9.4	0
26 – Tailings Dam Borrow Source	0.5	4.1	0
27 – TSF Access Road and Pipeline	2.8	7.3	0
28 – Tailings Dam Plunge Pool Area	5.9	0.9	0
29 – Slate Creek Cove Marine Terminal	1.9	0	0
30 – Slate Creek Cove Snow/Stockpile	0.2	0	0
Totals	**101.8**	**47.6**	**66.6**

[1] Total area (61.8 acres) includes 58.3 acres of deep water, greater than 6.6 feet in depth.

[2] Total lake area includes area of existing lake (21.9 acres).



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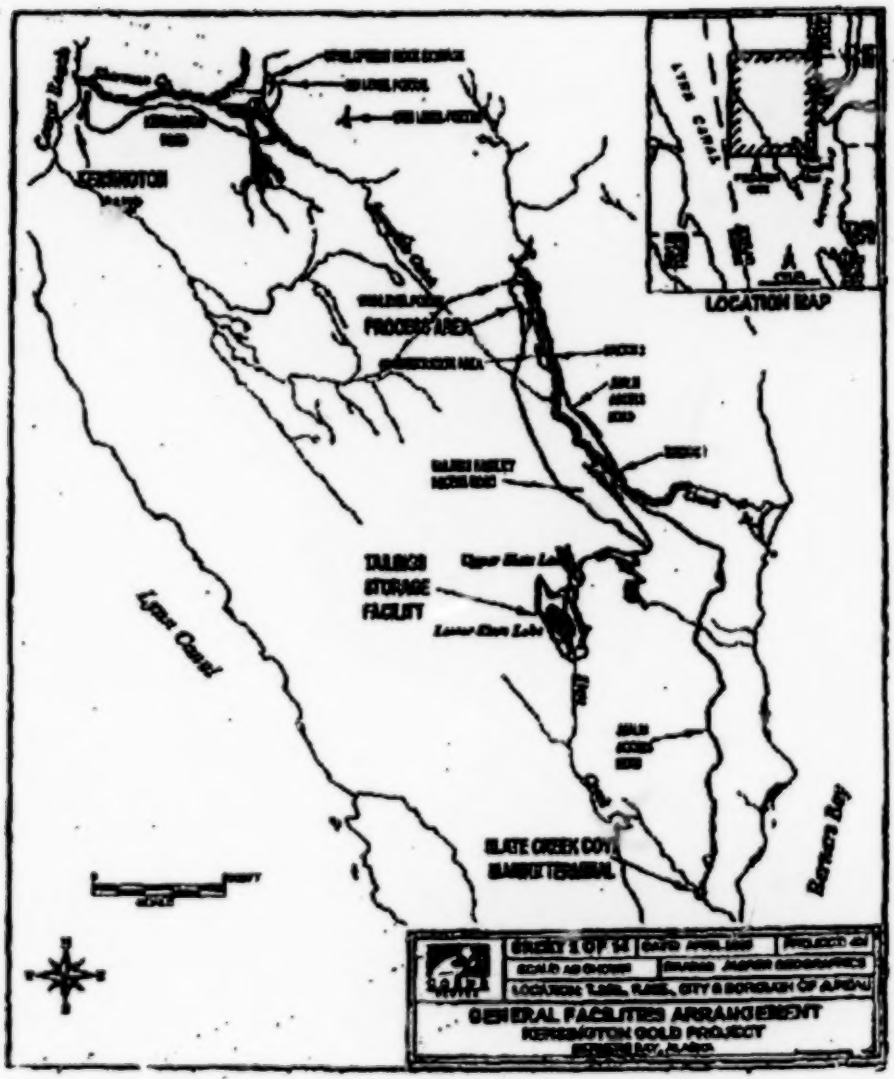
KENSINGTON
PROCESS AREA
TAILINGS STORAGE FACILITY
Upper Slate Lake
Lower Slate Lake
Lynn Canal
SLATE CREEK COVE
LOCATION MAP
GENERAL FACILITIES ARRANGEMENT
KENSINGTON GOLD PROJECT

JOINT APPENDIX

106

Nos. 07-984 and 07-990

Supreme Court, U.S.
FILED
SEP 17 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COEUR ALASKA, INC., *Petitioner*,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA, *Petitioner*,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
Volume 2 of 2
(Pages 287a–555a)

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TABLE OF CONTENTS

Page

Volume I

A. Relevant Docket Entries from the United States Court of Appeals for the Ninth Circuit, No. 06-35679 ..... 1a

B. Relevant Docket Entries from the United States District Court for the District of Alaska, No. 1:05-CV-00012-JKS 12a

C. Response to Comments Document regarding Section 404 Definitions of "Fill Material" and "Discharge of Fill Material" (May 3, 2002) 22a

D. Kline Environmental Research, Kensington Project Lower Slate Lake Tailings Impoundment: Habitat Creation and Mitigation Plan (July 14, 2003) 128a

E. Memorandum from Ed Kline, Kline Environmental Research, to Susan Hitchcock, Corps of Engineers (Dec. 23, 2003) 131a

F. Memorandum from D. Regas, et al., EPA, to R. Smith, EPA Region X (May 17, 2004). 141a

G. Technical Memorandum from Ed Kline, Kline Environmental Research, to Rick Richins (Aug. 17, 2004) 150a

H. Letter from Dan Easton, State of Alaska Department of Environmental Conservation, to John Leeds III, Department of the Army (Dec. 6, 2004) 155a

I. Forest Service, Kensington Gold Project Final Supplemental Environmental Impact Statement (Dec. 2004) (excerpts) 159a

J. Forest Service, Kensington Gold Project 2004 Record of Decision (Dec. 2004) 207a

K. Coeur Alaska, Inc., Reclamation and Closure Plan for the Kensington Gold Project (May 5, 2005) 249a

L. Letter from Ron Klein, State of Alaska Department of Environmental Conservation, to Rich Richins, RTR Resource Management, enclosing Certificate of Reasonable Assurance (May 6, 2005) 256a

M. Corps of Engineers, Section 404 Permit (June 17, 2005) 266a

Volume II

N. EPA, Record of Decision: Kensington Gold Project, Section 402 NPDES Permit (June 28, 2005) 287a

O. EPA, NPDES Permit No. AK-005057 (July 28, 2005) 317a

P. Declaration of Joe Kahklen (Oct. 12, 2005) 332a

Q. Corps of Engineers, Revised Record of Decision (Mar. 29, 2006) 340a

R. Corps of Engineers, Section 404(b)(1) Evaluation for Kensington Gold Project (Mar. 29, 2006) 378a

S. Corps of Engineers, Section 404(b)(1) Evaluation for Cascade Point (Mar. 29, 2006) (excerpts) 434a

T. First Amended Complaint (Apr. 4, 2006) 459a

U. Opinion of the United States District Court for the District of Alaska (Aug. 3, 2006) 478a

V. Declaration of Randy Wanamaker (Aug. 15, 2006) 497a

W. Order of the United States Court of Appeals for the Ninth Circuit Granting Injunction Pending Appeal (Aug. 24, 2006) 509a

X. Order of the United States Court of Appeals for the Ninth Circuit Denying Motion to Vacate the Injunction Pending Appeal (Dec. 8, 2006) 511a

Y. Opinion of the United States Court of Appeals for the Ninth Circuit (May 22, 2007) 517a

Z. Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc (Oct. 29, 2007) 552a

AA. Order of the United States Court of Appeals for the Ninth Circuit Staying the Mandate (Nov. 14, 2007) 554a

AB. Order of the United States Court of Appeals for the Ninth Circuit Directing Preparation of Reclamation Plan (Nov. 26, 2007) 555a

APPENDIX N

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

RECORD OF DECISION
KENSINGTON GOLD PROJECT

DECISION TO BE MADE

This Record of Decision (ROD) documents the decision by the U.S. Environmental Protection Agency (EPA) Region 10 to issue a National Pollutant Discharge Elimination System (NPDES) permit for discharges from the Kensington portal to Sherman Creek, discharges of treated domestic wastewater to Lynn Canal, and discharges from the proposed tailings storage facility (TSF) to East Fork Slate Creek. This project is considered a new source discharge and, in accordance with Section 511(c)(1) of the Clean Water Act, is subject to the provisions of the National Environmental Policy Act (NEPA).

The ROD is issued pursuant to NEPA (42 U.S.C. §4321 et seq.), the Council of Environmental Quality (CEQ) NEPA regulations (40 CFR Parts 1500-1508), and EPA's NEPA implementing regulations (40 CFR Part 6, Subpart F). EPA participated in the development of the Kensington Gold Project Final Supplemental Environmental Impact Statement

(FSEIS) as a cooperating agency, with the U.S. Forest Service (USFS) as the lead agency. EPA's decision to issue an NPDES permit is based upon the analysis in the FSEIS as supplemented by the U.S. Army Corps of Engineers (USACE) Clean Water Act 404(b)(1) analysis, which identified alternative D as the least environmentally damaging practicable alternative. The Notice of Availability of the FSEIS was published in the Federal Register by the USFS on December 23, 2004. EPA issued the draft NPDES permit on June 21, 2004 for a 45-day comment period. Public hearings were held in Juneau, Alaska on July 26, 2004 and in Haines, Alaska on July 27, 2004. EPA's response to comments on the draft NPDES permit is included in Appendix A.

INTRODUCTION

The Kensington Gold Project is an underground gold mine located approximately 45 miles north-northwest of Juneau, Alaska, in the Tongass National Forest (Figure 1; FSEIS Figure 1-1). The Kensington project has undergone three iterations of environmental review and was previously permitted in 1998. In 1990, the Kensington Venture (a joint venture between Coeur Alaska, Inc. [Coeur] and Echo Bay Exploration) first submitted plans to develop the mine to the USFS. The USFS completed the Final Environmental Impact Statement (FEIS) in 1992. The 1990 plan included underground mining to recover the ore, processing the ore via flotation, cyanidation, gold refining, and disposal of the tailings in a tailings impoundment built in the Sherman Creek drainage. The impoundment would have been sized to accommodate 30 million tons of tailings. The proposal included discharging wastewater to Lynn Canal following treatment, and shuttling employees

to the mine site using helicopters. The operation would have used liquefied petroleum gas to fuel on-site generators. A marine terminal developed at Comet Beach in Lynn Canal would have handled supply deliveries and gold shipments. The Kensington Venture never obtained all the permits necessary to build the mine, and in 1995 Coeur became the sole stakeholder in the property. Coeur then, in 1995, submitted an amended plan of operations to the USFS. In June 1996 Coeur revised the 1995 plan in response to issues raised during scoping.

The 1996 amended plan, included removal of the cyanide circuit and off-site processing of the flotation concentrate, backfilling a portion of the tailings in the mine, and disposal of the remaining tailings in a 20 million ton dry tailings facility (DTF) constructed between Sherman and Sweeny creeks. Coeur's proposal also included using diesel instead of liquefied petroleum gas to fuel generators, and discharging mine water to Sherman Creek and DTF effluent to Camp Creek. The 1996 plan was analyzed in the Final Supplemental EIS and approved by the USFS in a ROD signed in August 1997. Coeur obtained all permits necessary for construction from federal, state, and local authorities, including an NPDES permit from EPA, issued on May 14, 1998 (Permit No. AK-005057-1). The permit authorized discharge of drainage from the Kensington portal, which is treated and discharged to Sherman Creek. It also authorized the discharge from the permitted DTF to Camp Creek and domestic wastewater discharge to Lynn Canal.

In November 2001, Coeur submitted another amendment to the plan of operations to the USFS. This plan, which initiated a second supplemental en-

vironmental impact statement, proposed a number of changes to the approved plan, including changing the location of the processing facilities, tailings disposal, and site access and employing a different means of transportation. The operation would also mine a smaller portion of the ore body containing higher average gold concentrations. This amendment also proposes to use a dock to be built at Cascade Point on property held by Goldbelt Incorporated, an Alaska Native corporation. The 2001 amended plan formed the basis for Alternative B for the December 2004 FSEIS. The USFS selected Alternative D in a ROD signed on December 9, 2004. Coeur revised its plan of operations to conform to Alternative D in May 2005. The USFS approved the plan of operations in June 2005.

The purpose of the proposed action is to consider changes to the previously permitted project. The changes were intended to improve efficiency and reduce the area of surface disturbance associated with the 1997 mining plan and to provide more reliable transportation and access by improving worker safety during transit to the site and eliminating shipping delays related to weather and sea conditions at Comet Beach. The improved reliability of access would allow Coeur to reduce the amount of diesel storage, as well as inventories of materials and supplies. Tailings disposal would require a smaller area of surface disturbance under the proposed action compared to the 1997 plan by utilizing a 20-acre lake for tailings storage (Lower Slate Lake).

The U.S. Forest Service was the lead agency for preparation of the Kensington Gold Project Final Supplemental EIS. EPA, the U.S. Army Corps of Engineers, and the State of Alaska Department of

Natural Resources (ADNR) were cooperating agencies because of the federal and state authorizations and approvals required for this project. EPA was a cooperating agency because of a decision regarding NPDES permit issuance. In accordance with NEPA, the FSEIS was prepared to reduce duplication, excessive paperwork and delay, and to address federal and state regulatory requirements. Through EPA's participation as a cooperating agency, we have determined that the FSEIS adequately describes the potential direct, indirect, and cumulative effects associated with the Kensington Mine Project.

Sections 301 and 306 of the Clean Water Act (CWA) require that EPA develop wastewater effluent standards for specific industries, including gold mines. These standards are established for both existing sources and "new sources". Because this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project (40 CFR 440.104). NPDES permit limits and requirements are established to ensure compliance with the NSPS and state water quality standards. The NSPS include effluent limits applicable to discharges of mine drainage; they also prohibit the discharge of process water (including mine tailings). An exception is provided for excess flows associated with net precipitation and/or co-mingled mine water where discharge of such flow is subject to the comparable effluent limits for mine drainage. In states that have not been delegated NPDES permitting authority, such as Alaska, EPA is authorized to permit point source discharges of effluent, including process wastewater and stormwater. Where EPA is the permitting agency, the regulations provide that issuance of a new source NPDES is sub-

ject to the environmental review requirements of NEPA.

The 5-year NPDES permit issued by EPA for the 1998 project expired on May 14, 2003, but was administratively extended until a new permit is issued because Coeur submitted a timely application in October 2002. Couer submitted a revised application for an NPDES permit on March 16, 2004. The final NPDES application submittal, consistent with the proposed project revisions, was made on June 15, 2004. The application addresses the current discharge to Sherman Creek, treated domestic wastewater discharge during construction, and the proposed discharge from the tailings storage facility (TSF) in Lower Slate Lake.

PROPOSED MINING OPERATION

The Kensington ore body extends from the surface to a depth of approximately 3,000 feet and is irregular in both shape and distribution of gold. After a two-year construction period, mining would be accomplished over a projected period of 10 years using a long hole, open stoping method. Ore would be mined at a rate of 2,000 tons per day targeting high-grade gold ore. Ore would be hauled by truck to the mill site located near the Jualin mining area. After crushing, the ore would be transferred to a grinding circuit. Following grinding, oversized material would be returned to the head of the grinding operation, while undersized material would be separated into coarse and fine materials using centrifugal cyclones. From the cyclones, heavy material would go to a gravity concentrator and light material would go to a conditioning tank that feeds a flotation circuit. Concentrate from the gravity concentrator and the flotation circuit would be dewatered, and approxi-

mately 700 tons per week of concentrate would be transported from the site. From 2,000 tons of ore per day, mining and processing would produce approximately 400 tons of waste rock per day and approximately 7.5 million tons of tailings over the lifetime of the proposed project.

Waste rock would be disposed in two disposal areas near the Kensington portal and near the Jualin mine area. Tailings would be separated into coarse and fine fractions. The coarse tailings would be pumped to the mine areas that need backfill. At least 40% of the tailings would be backfilled. The fine fractions would be disposed in the tailings storage facility.

Mine drainage is currently combined with runoff from waste rock piles and other disturbed areas and discharged to Sherman Creek through Outfall 001, pursuant to the 1998 NPDES permit. Underground workings that produce mine drainage, as well as waste rock, were developed as part of exploration activities and will be expanded as active mining operations are initiated. Water from mine dewatering operations will continue to be collected, clarified, and filtered underground, if necessary, and then pumped to an above ground mine water treatment facility. Although the revised proposal includes access to the workings by tunnels from both the Kensington and Jualin sides of the property, all mine drainage would be collected and routed to Outfall 001.

Tailings slurry from the mill would flow through a 3.5 mile pipeline to the TSF, which would be formed by the natural lake basin of Lower Slate Lake and a dam constructed at the outlet of the lake. The dam would be a concrete-faced rockfill dam con-

structed in two phases. The TSF would be designed to hold 4.5 million tons of tailings. Mid-lake East Fork Slate Creek would be diverted around the TSF. Creek water would be removed from behind a constructed berm through a 20-inch diversion pipeline. The TSF will receive water from slurry transport of tailings as well as undiverted natural inflows from drainage areas immediately adjacent to the TSF and overflows from the berm. Water will be recycled from the TSF to the mill at a rate of approximately 100 gallons per minute (gpm). The discharge from the TSF (Outfall 002) will be treated via reverse osmosis then combined with the diverted natural flows and pumped into the East Fork Slate Creek drainage below the TSF.

DESCRIPTION OF PROJECT ALTERNATIVES

NEPA requires that agencies consider alternatives to the proposed action that address the significant issues identified during the scoping process. NEPA also requires that the alternatives analysis include a No Action Alternative. Because the FSEIS is a supplement to a NEPA analysis that resulted in a permitted project (the 1997 mining plan), the No Action Alternative in this case represents no changes to the approved project. The FSEIS also includes an alternative (Alternative Al) that reflects a mining scenario that could occur if the No Action Alternative was selected, i.e., the operator could choose to lower the production rate and pursue a smaller portion of "high-grade" gold ore similar to what is proposed in the proposed action. The following discussion and Table 1 provides a summary of the No Action Alternative (Alternative A), reduced mining rate of the No Action Alternative (A1), and three action alternatives (Alternatives B, C, and D).

Section 2 of the 2004 FSEIS provides detailed descriptions of each of the following alternatives for the Kensington Gold Project.

Alternative A – No Action

The No Action Alternative functions as the baseline against which the effects of other alternatives are compared. As noted above, the No Action Alternative represents a previous action, which in this case is the 1997 mining plan that received agency approval and authorizations in 1998. Alternative A corresponds to the 1997 SEIS Alternative D. Alternative A includes mining the entire ore body and underground crushing of ore with aboveground grinding and flotation. Flotation concentrate would be shipped to a processing facility off-site. There would be no on-site cyanidation circuit. Employees would be housed on-site and transported by helicopter for weekly rotations. Supplies, including fuel, would be delivered to a marine terminal constructed on Comet Beach. Approximately 25% of the tailings would be backfilled. The rest of the tailings would be dewatered before being placed in the DTF. The DTF would have the design capacity to hold 20 million tons of tailings and would include an engineered berm around each cell of the facility. Wastewater from tailings dewatering would be treated and discharged to Sherman Creek. The production rate would be 4,000 tons of ore per day and 400 tons of waste rock per day. The waste rock would be used in the construction of the DTF. Road and DTF construction would require the development of sand and gravel and till borrow areas.

Alternative A1 – Reduced Mining Rate, DTF

Alternative A1 reflects a mining plan similar to that described for Alternative A but uses the same

mining rate and tailings production levels consistent with Alternatives B, C, and D (2,000 tons per day and 7.5 million tons total, respectively).

Alternative Al would result in 4.5 million tons of tailings being placed in the DTF, assuming that 40 percent of the tailings would be haat-died. The DTF would be approximately 65 percent smaller than it would be under Alternative A. The reduced mining rate presented under Alternative A1 would produce very limited amounts of waste rock. Because waste rock would not be available for use in DTF construction under this alternative, the impact analysis assumes the same number of acres of sand and gravel borrow areas would be required as under Alternative A, although the coarse and fine till borrow areas would be reduced in size. Other aspects of Alternative A1, including wastewater management and transportation of employees and materials, would be the same as those described under Alternative A.

Alternative B – Coeur's Proposed Action

Alternative B reflects a number of changes to the mine plan compared to the No Action Alternative. These changes include construction of a TSF in Lower Slate Lake for tailings disposal instead of the dry tailings facility, relocating milling operations to the Johnson Creek drainage, and eliminating the personnel camp. The operation would mine a smaller amount of ore with a higher average gold concentration compared with that proposed under Alternative A. The production rate would be approximately 2,000 tons of ore per day. Alternative B would include the development of a tunnel connecting the Kensington and Jualin areas of the mine. Access to the site would be from marine terminals built in Slate Creek Cove and at Cascade Point (Figure 2; FSEIS Figure

1-2). A daily shuttle boat service would transport employees to and from the project site. The TSF would be sized to accommodate the disposal of 4.5 million tons of tailings (Figure 3; FSEIS Figure 2-6), while approximately 3.0 million tons of tailings would be used as backfill in the mine. Borrow areas would be developed for construction of the TSF dam and roads. This alternative includes recycling water from the TSF to the mill circuit. Alternative B would require upgrading the 5-mile-long access road and constructing a 3.5-mile pipeline access road and a 1-mile cutoff road connecting the other two roads.

Alternative C – Dock Location and Design/ Diversion

Alternative C is the same as Alternative B except it includes surface water diversions around the TSF and a marine terminal at Echo Cove instead of Cascade Point. The dock in Echo Cove would be located approximately 0.75 mile north of the existing Echo Cove boat ramp (Figure 2; FSEIS Figure 1-2). Mine workers would use this dock to reach the shuttle boat that would transport them to the dock at Slate Creek Cove. The landing craft ramp at the Slate Creek Cove marine terminal would be eliminated, minimizing the amount of fill placed in the intertidal zone. Alternative C would not include recycling water from the TSF and the mill circuit. This alternative would include diversion channels to direct the flow from Mid-Lake East Fork Slate Creek and overland runoff from undisturbed areas around the TSF (Figure 4; FSEIS Figure 2-9). The diversion would discharge to a spillway at the top of the TSF dam. The diversion would require a dam on Upper Slate Lake to maintain water levels sufficient to reach the spillway at the TSF dam. The purpose of the diversion would be

to minimize the volume of fresh water in contact with the tailings.

Alternative D – Modified TSF Design and Water Treatment

Alternative D was developed to address concerns about the TSF effluent meeting NPDES permit limits for protection of downstream water quality in East Fork Slate Creek below the TSF. Alternative D is the same as Alternative B, except it also includes diversion of stormwater and surface water around the TSF, TSF outfall water treatment, and a tailings cap at closure. Alternative D includes a dam in Mid-Lake East Fork Slate Creek that would gravity-feed a pipeline diversion around the TSF (Figure 5; FSEIS Figure 2-12). Water would be treated prior to discharge from the TSF via a reverse osmosis treatment system, which would provide solids and metals removal to ensure compliance with permit limits. Effluent from the treatment system would discharge to the diversion pipeline. Alternative D also requires a cap over the tailings at closure unless the operator could demonstrate to the USFS, USACE, ADNR, and EPA that the tailings are not toxic.

ENVIRONMENTALLY PREFERABLE ALTERNATIVE

The environmentally preferable alternative "ordinarily, means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources" (CEQ, 1981: Forty Most Asked Questions, no. 6a).

On December 1, 2004, at the request of the U.S. Forest Service, EPA submitted its designation of an

environmentally preferable alternative for inclusion in the FSEIS. EPA's selection of an environmentally preferable alternative was based on the record at the time, which lacked two important elements. First, the record lacked a completed ESA analysis by the National Marine Fisheries Service (NMFS) addressing potential impacts to listed species and designated critical habitat in Berners Bay. Second, the record lacked a completed Clean Water Act (CWA) § 404(b)(1) analysis from the U.S. Army Corps of Engineers, which must determine the least environmentally damaging practicable alternative and address significant degradation.

Based on information available at the time and on EPA's comparative analysis of the alternatives, EPA concluded that Alternative A is the Environmentally Preferable Alternative. Alternative A is the only alternative that avoids the habitat loss and the loss of natural ecological functions in Lower Slate Lake during mine operations. Alternative A also avoids impacts to critical habitat and resources in Berners Bay that would result from dock construction, operation, and vessel activities. The USFS and the ADNR identified both Alternatives A and D as environmentally preferable.

Since that time; NMFS has issued a Biological Opinion (BO) and the Corps of Engineers has issued CWA 404 permits for the project. In the BO, issued on March 18, 2005, NMFS stated that individual Stellar sea lions and humpback whales within the action are may be adversely impacted. However, the BO concluded that Alternative D, as proposed, is not likely to jeopardize the continued existence of listed species, or destroy or adversely modify designated critical habitat found in proximity to the action area.

NMFS maintained its earlier recommendation to use an alternative dock location to Cascade Point, preferably outside Berners Bay, to facilitate transportation of crews to the mine. The BO also included a list of conservation recommendations to minimize adverse effects to the listed species.

The Corps of Engineers CWA 404(b)(1) analysis, issued with the Record of Decision and CWA 404 permit, on June 17, 2005, concluded that Alternative D is the least environmentally damaging alternative based on acreages of wetland impacts. The Corps also concluded that Alternative D is economically more attractive than the previously permitted project.

The USFS selected Alternative D and approved the modifications to the 1997 Approved Plan of Operations in its Record of Decision (December 2005). The State of Alaska has also issued its decisions, authorizations, and certifications for Alternative D.

However, for the reasons discussed in our December 1, 2004 letter, EPA continues to believe that Alternative A is environmentally preferable.

EPA DECISION

EPA's decision regarding the Kensington Gold Project involves the issuance of an NPDES permit based on Coeur's NPDES permit application, which reflects Alternative D. The permit sets conditions on the discharges of pollutants from the mine to Sherman Creek (Outfall 001), from the TSF to East Fork Slate Creek (Outfall 002), and domestic wastewater to Lynn Canal (Outfall 003).

Outfall 001 represents the discharge from settling facilities that collect treated (metals precipitation and filtration) mine drainage from

mine dewatering operations and runoff from waste rock piles and other disturbed areas in the Sherman Creek drainage. Outfall 002 will discharge water from the TSF, which includes the natural lake basin of Lower Slate Lake and a constructed retention embankment at the outlet of the lake. Outfall 003 will discharge treated domestic wastewater for the Kensington Mine camp during construction. No permanent camp is proposed to remain at the site during the operation phase of the project. The NPDES permit includes effluent limitations specific to each outfall and other requirements to ensure water quality protection in each of the water bodies mentioned above, including compliance with the Alaska Water Quality Standards (AWQS) for aquatic life and human health.

EPA made the draft NPDES permit and Fact Sheet available for a 45-day public review period on June 21, 2004. The draft permit contained effluent and receiving water (ambient) monitoring requirements as well as requirements that the permittee develop a Best Management Practices program for the control of toxic and hazardous pollutants.

The final permit and response to comments are included in this ROD in Appendix A.

FACTORS CONSIDERED IN THE DECISION

Scope of EPA's Clean Water Act § 402 Authority

EPA's NPDES permitting authority is limited to issuing permits based on NPDES permit applications we receive, so long as it is feasible for the project, as described in the application, to meet water-quality based limits. Coeur applied for an NPDES permit to discharge wastewater based on Alternative D. Coeur has gained approval to begin construction and opera-

tion of the Kensington Mine Project from the USFS, the USACE, and the State of Alaska, whose consent or authorization is necessary. Coeur has demonstrated their ability to implement treatment options (such as reverse osmosis for outfall 002) that will enable them to meet permit limits.

Receiving Waters

The permit authorizes discharges through three outfalls. Outfall 001 discharges mine water to Sherman Creek, and is located at latitude 58° 52' 04" North and longitude 135° 06' 55" West. Outfall 002 will discharge from the TSF to East Fork Slate Creek at latitude 58° 49' 58" North and longitude 134° 57' 58" West. Outfall 003 will discharge treated domestic wastewater to Lynn Canal at latitude 58° 51' 58" North and longitude 135° 8' 28" West.

East Fork Slate Creek and Sherman Creek are designated by the State as protected for water supply (drinking, culinary, and food processing; agricultural irrigation and stock watering; aquaculture; and industrial); contact and secondary recreation; and growth and propagation of fish, shellfish, other aquatic life, and wildlife (18 ACC 70.020(2)). Lynn Canal is protected for marine water supply (aquaculture, seafood processing and industrial); water recreation (contact and secondary); growth and propagation of fish, shellfish, other aquatic life, and wildlife; and harvesting for consumption of raw mollusks or other raw aquatic life.

Description of Discharges

Outfall 001

Outfall 001 represents the discharge from settling facilities into Sherman Creek. Inflows to the sediment ponds include treated mine drainage from

mine dewatering operations and runoff from waste rock piles and other disturbed areas in the Sherman Creek drainage. The sediment pond has two cells. Stormwater runoff from waste rock and disturbed areas is routed to Cell 1 via a riprap lined spillway, which is sized to handle runoff from a 100-year, 24-hour precipitation event. A spillway, notched in the center berm, allows flow from Cell 1 to Cell 2. Cell 2, which is designed to treat water from mine dewatering operations and high flows from Cell 1, has been conservatively designed to hold settled solids for the life of the mine. Discharge from Cell 2 to Outfall 001 occurs through a perforated decant pipe with a design capacity to handle the 10-year, 24-hour storm event. Discharge flows from Outfall 001 will initially increase due to increased mine development area and will vary over time due to stormwater runoff.

Coeur estimates the rate of mine dewatering to generally range from 1.33 and 2.45 cubic foot per second (cfs). All of the flow will be collected in sumps within the mine where initial settling will occur. Mine drainage will be pumped to the mine water treatment system for metals precipitation and filtration. Settled solids will be added to tailings that are backfilled into the mine. Filter backwash will be recycled to the underground mine water treatment system.

Outfall 002

Outfall 002 will discharge water from the TSF to East Fork Slate Creek. The natural lake basin of Lower Slate Lake and a constructed retention embankment at the outlet of the lake will form the TSF. TSF inflows include tailings slurry from mill operations, precipitation that falls onto the lake, storm water runoff from upland areas adjacent to the TSF,

and flows from Mid-Lake East Fork Slate Creek (if the flows are too high for the diversion to accommodate). The upstream flow in East Fork Slate Creek will be collected and transferred to a 20-inch diversion pipeline.

Tailings slurry will flow by gravity from the mill to the TSF in a 3.5-mile pipeline. The pipeline will be double-walled high density polyethylene (HDPE) and/or steel. The tailings slurry will be discharged into the TSF through perforations in a submerged portion of the tailing delivery pipeline. The pipeline will be operated so that a portion of the perforated segment is always above the bottom of the TSF, allowing the tailings to flow freely from the pipe.

The average slurry throughput to the TSF is projected to be 354 gpm with an average solids content of 55 percent by weight (i.e., the water component of the slurry will be approximately 247 gpm). A portion of the slurry water will be entrained in the tailings and will be unavailable for recycle. Coeur will recycle an average of 100 gpm out of the TSF back to the mill.

Coeur initially proposed to discharge effluent via Outfall 002 without treatment other than best management practices (BMPs) to enhance settling. However, water quality modeling indicated that total suspended solids (TSS) limits may not be achieved without additional treatment. In addition, background levels of aluminum in East Fork Slate Creek and Lower Slate Lake occasionally exceed the permit limits. As a result, Coeur amended its NPDES permit application to incorporate a reverse osmosis (RO) treatment system into the TSF design. The RO system will reduce levels of both aluminum and TSS to below permit limits and provide additional removal

of other pollutants. A maximum total of 1,100 gpm is authorized to be discharged out of Outfall 002.

Outfall 003

The discharge of treated domestic wastewater for the Kensington Mine camp was previously permitted for use during exploration, construction and production. The current project anticipates the use of the camp through exploration and construction. No permanent camp is proposed for the site during the operation phase of the project. Domestic wastewater will be treated and discharged from Outfall 003 to Lynn Canal. The average flow for the plant during construction is estimated at 30,000 gallons per day (gpd), or 20.8 gpm, based on sizing to accommodate 300 people.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act (ESA) requires Federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS), as appropriate, to ensure that their actions do not jeopardize the continued existence of species listed as threatened or endangered under ESA, or destroy or adversely modify their critical habitat.

Through the NEPA process, EPA obtained a list of threatened and endangered species. On June 21, 2004, EPA sent a copy of the draft NPDES permit and Fact Sheet to NMFS and USFWS. In the Fact Sheet, EPA stated we do not expect the discharges from the facility, which comply with the requirements of the permit, to adversely affect endangered species. On November 17, 2004, the U.S. Forest Service and the U.S. Army Corps of Engineers sent a copy of the Biological Assessment/Biological Evalua-

tion (BA/BE) to NMFS and requested initiation of formal consultation. NMFS issued a final Biological Opinion (BO) on March 18, 2005. The BO did not include any specific conservation recommendation applicable to the NPDES permit issuance.

Essential Fish Habitat (EFH)

Section 305(b) of the Magnuson Stevens Fishery Conservation and Management Act of 1996 requires Federal agencies to consult with NMFS when any activity proposed to be permitted, funded, or undertaken by a federal agency may have an adverse effect on designated Essential Fish Habitat (EFH). As stated in the Fact Sheet, EPA has determined that the issuance of the permit is not likely to have an adverse effect on EFH in the vicinity of the discharge. Effluent limitations have been incorporated in the permit based on criteria considered to be protective of overall water quality in East Fork Slate Creek, Sherman Creek, and Lynn Canal.

National Historic Preservation Act (NHPA)

The USFS completed a cultural resource survey of the area of potential effect (APE) for the Kensington Gold Project in 2003, in compliance with the requirements of Section 106 of the National Historic Preservation Act (16 U.S.C. 470 et seq). The USFS sent determinations of eligibility of 43 historic sites within the APE to the State Historic Preservation Office for concurrence. Additionally, Coeur, the Alaska State Historic Preservation Office, and the Tongass National Forest entered into a Memorandum of Agreement (MOA) on November 29, 2004 to ensure compliance with Section 106 of the NHPA during mine construction, operation, and closure.

Coastal Zone Management Act (CZMA)

The State of Alaska, Office of Project Management and Permitting (OPMP), completed its review of the Kensington Gold Project for consistency with the Alaska Coastal Management Program (ACMP) on April 25, 2005. OPMP found the project, including the discharge of pollutants such as treated domestic wastewater and treated non-domestic wastewater from the Kensington Mine, to be consistent with the ACMP.

Wetlands (Executive Order 11990)

Wetlands throughout the project area would be affected by construction and operations. Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for activities that would result in the placement of dredge or fill material in waters of the U.S., including wetlands. Before a permit can be issued, Section 404 [illegible] Guidelines require that projects avoi[illegible]pacts to the extent possible, minimize impacts that cannot be avoided, and provide compensatory mitigation for impacts that occur. Alternative D is estimated to impact a total of 61.7 acres of U.S. waters, including 41.5 acres of wetlands filled, 20 acres of open water filled, and 0.2 acres of marine waters filled (USACE ROD, June 17, 2005). The Corps, in their CWA 404 permit and Record of Decision, determined Alternative D was least environmentally damaging based on total wetland acreages of impact.

Floodplains (Executive Order 11988)

The Kensington Gold Project is not located within floodplains.

Environmental Justice (Executive Order 12898)

EPA's issuance of the NPDES permit will not result in disproportionate adverse human health or environmental effects to minority or low-income communities.

Tribal Consultation and Coordination (Executive Order 13175)

On January 23, 2004, EPA sent letters to Chilkat (Klukwan) Village, Chilkoot Indian Association, Douglas Indian Association, and Tlingit and Haida Central Council informing the Tribes that the preliminary permit will be sent for tribal review. EPA also invited the Tribes to initiate formal government-to-government consultation with EPA in developing the final draft permit prior to public release. EPA transmitted the preliminary draft permit and draft Fact Sheet to the Tribes on April 8, 2004. EPA received no comments in response. Each Tribe also received a copy of the draft permit and Fact Sheet at the start of the public comment period on June 21, 2004. EPA did not receive any comments from these Tribes.

MITIGATION MEASURES

Section 2.5 and Tables 2-6 and 2-7 of the FSEIS identifies potential mitigation and monitoring measures required as part of Alternative D during construction, operation, and reclamation. Additional mitigation measures have been developed as part of stipulations, special conditions, monitoring requirements of other Federal and State permits and authorizations to ensure that environmental protection is being achieved.

Alternative D also includes the construction of a reverse osmosis treatment system to treat the TSF

effluent water. The RO system would ensure compliance with permit limits for total suspended solids and metals. The treatment plant effluent would discharge into the diversion pipeline, which would flow to East Fork Slate Creek below the TSF dam.

Once tailings disposal is complete, the tailings would be capped to isolate any toxic contaminants unless Coeur could demonstrate to the satisfaction of EPA that tailings are not toxic. Although the FSEIS refers to a cover of approximately 4 inches of native material, the cap design (e.g., horizontal and vertical dimensions, types of materials, placement methods, etc.) will depend on the evaluation of the test results and the site characterization at closure.

The U.S. Army Corps of Engineers, in its CWA 404 permit, requires a special condition for Coeur to use nontoxic chemical flocculent to enhance the deposition of suspended particles and reduce turbidity levels in the Lower Slate Lake disposal site.

MONITORING

Under Section 308 of the Clean Water Act and 40 CFR 122.44(i), EPA must require a discharger to conduct monitoring whenever necessary to determine compliance with effluent limitations and assist in the development of effluent limitations. The permit contains both effluent and receiving water (ambient) monitoring requirements. The data from ambient monitoring is important for determining whether effluent limits in the proposed permit are adequate, and may be necessary for the development of water quality-based effluent limitations when the permit is reissued. The permit also requires that Coeur prepare a Quality Assurance Plan for all monitoring.

Outfall Monitoring

To ensure compliance with the effluent limitations, Coeur is required to monitor the discharges from Outfalls 001, 002, and 003 for metals, toxicity, and other parameters on a routine basis (See Permit Tables 1-4). The permit also requires that the percent removal for BOD and TSS be calculated on a quarterly basis for Outfall 003. This would entail measuring the influent as well as the effluent for these parameters.

Receiving Water (Ambient) Monitoring

The permit requires Coeur to conduct ambient monitoring in Sherman Creek, Slate Creek, and Johnson Creek.

Water Column Monitoring

The permit requires monthly water column monitoring for metals and other parameters at locations in Sherman Creek, Slate Creek, and Johnson Creek. The Sherman Creek and Slate Creek monitoring will provide data to assess the characteristics of the receiving stream below the discharges. Monitoring in Johnson Creek will be used to determine whether the process areas are affecting conditions in the creek.

Sediment Monitoring

The permit requires annual sediment monitoring for metals and other parameters and annual toxicity testing to assess the effect of mine effluent on sediments within the receiving streams. The permit requires sampling in Sherman Creek at a location immediately downstream of Outfall 001 and at another location below the fish barrier. Additional sampling is required at a location be-

low Outfall 002 in East Fork Slate Creek and in lower Slate Creek below the fish barrier. Sediment sampling is also required at a location in upper Johnson Creek immediately below the process area.

Biological Testing and Monitoring of Aquatic Resources

Benthic Invertebrates — The permit requires benthic invertebrates monitoring using methods and locations established in baseline surveys in Sherman and Sweeny creeks. In Slate and Johnson Creeks, Coeur will define reaches to be sampled that are representative of potential impacts from Outfall 002 and the process area, respectively. Each reach will be delineated for all possible sampling sites. Every third or fourth sampling site will be sampled until a total of 6 samples are collected. Sampling will be conducted once during the construction period and annually thereafter.

Resident Fish — Abundance and condition of Dolly Varden char in Sherman, Slate, and Johnson creeks will be monitored using annual snorkel observations or electrofishing techniques comparable to those employed in previous baseline studies. Surveys will be conducted in: upper, middle, and lower Sherman Creek; East Fork Slate Creek and Lower Slate Creek; and Johnson Creek. These surveys will focus on fish greater than 25 mm. Data to be derived from the surveys include: 1) population estimates by species, habitat type, and stratum, and 2) condition factor by stratum.

Anadromous Fish — Annual surveys of spawning salmon in Sherman, Slate and Johnson creeks

will be conducted to assess the size of the escapement. Surveys will consist of weekly stream counts throughout the spawning season documenting the distribution of salmon within the surveyed areas. Outmigrating juvenile pink salmon from the Sherman, Slate, and Johnson creek drainages will be sampled during the spring following each year of adult counts. Quantitative methods, such as screw trap or inclined plane trap will be used to estimate the relationship between adult escapement and fry protection.

The quality of spawning substrate used by pink salmon will be monitored to detect possible changes caused by potential introduction of fine sediments into lower Sherman, Slate, and Johnson creeks. Sediment samples will be collected in July prior to spawning activity.

Aquatic Vegetation – Annual visual surveys of visual impacts of aquatic vegetation in Sherman, Slate, and Johnson creeks will be conducted during the summer months.

RECLAMATION

Section 2.3.19 of the FSEIS discusses the general reclamation procedures for all the alternatives and summarizes how major mine components would be reclaimed. A more detailed closure and reclamation plan specific to Alternative D is presented in Appendix 1 of the Final Plan of Operations.

BEST MANAGEMENT PRACTICES (BMP) PLAN

Section 402 of the Clean Water Act and federal regulations at 40 CFR 122.44(k)(2) and (3) authorize EPA to require Best Management Practices (BMP) Plan in NPDES permits. The BMP Plan will be used

to control the discharge of toxics or hazardous pollutants by way of spillage or leaks, sludge or waste disposal, and drainage from raw material storage. The BMP Plan must be maintained at the mine facility and amended whenever there is a change in the facility or in the operation of the mine which materially increases the potential for an increased discharge of pollutants. Annually, the BMP Plan must be reviewed and certified.

PUBLIC INVOLVEMENT

The public involvement process is presented in Section 1.5 of the FSEIS. The following is a chronology of the public involvement process for the FSEIS and NPDES permitting process:

September 13, 2002	The *Notice of Intent (NOI)* was published in the Federal Register and announced the USFS' intention to develop an SEIS under NEPA for the Kensington Gold Project. The NOI initiated the 30-day public scoping period.
Sept. 19 & 21, 2002	Scoping open houses held in Juneau and Haines, respectively.
January 23, 2004	Draft SEIS released to the public for review and comment.
Feb. 24 & 26, 2004	Public meetings on the Draft SEIS were held in Juneau and Haines, respectively.
June 21, 2004	EPA, U.S. Army Corps of Engineers, and the State of Alaska issued draft permits and draft

	decisions/authorizations (draft NPDES permit, CWA 404 public notices, draft State CWA 401 certifications, draft State decisions and authorizations) for public comment.
July 26 & 27, 2004	Public hearings on draft Federal and State permits and decisions/authorizations were held in Juneau and Haines, respectively.

CONCLUSIONS

Based on the NPDES permit application received by EPA, Coeur's demonstration that the project can meet permit limits, and the findings of the FSEIS, EPA is issuing an NPDES permit, with discharge limits, for Alternative D. The permit authorizes treated mine water discharges from Outfall 001 to Sherman Creek, treated TSF discharges from Outfall 002 to East Fork Slate Creek, and treated domestic wastewater discharge during construction from Outfall 003 to Lynn Canal. The final NPDES permit is included in Appendix A.

Further information regarding this Record of Decision (ROD) may be obtained by contacting:

Hanh Shaw
NEPA Compliance Coordinator
U.S. Environmental Protection Agency
1200 Sixth Avenue, OWW-130
Seattle, WA 98101
E-mail: shaw.hanh@epa.gov
Telephone: (206) 553-0171
Facsimile: (206) 553-0165

Approving Official:

/S/ Michael F. Gearheard 6/28/2005

Michael F. Gearheard, Director
Office of Water and Watersheds

Alternative	A	A1	B (Coeur's Proposed Action)	C	D
Alternative Description	1998 permitted project	Same as A w/reduced mining rate	Recycle process water; no treatment of TSF effluent	Same as B except with no recycle	Same as B except with treatment of TSF effluent by reverse osmosis and capping of the sediment post-operation
Tailings Disposal	DTF 20 million tons; 25% backfilled	DTF 4.5 million tons; 40% backfilled	Lower Slate Lake TSF 4.5 million tons; 40% backfilled	Lower Slate Lake TSF 4.5 million tons; 40% backfilled	Lower Slate Lake TSF 4.5 million tons; 40% backfilled
Diversion	Stormwater diversion around DTF	Stormwater diversion around DTF	No diversion	Ditch diversion around TSF-would require damming of Upper Slate Lake and raising water level 20 ft. to allow gravity flow	Pipeline diversion around TSF - would require dam in Mid-lake East Fork Slate Creek
Access/Marine Facilities	On-site housing; workers transported by helicopter (12 RT per week); marine terminal at Comet Beach	Same as A	No on-site housing; daily crew shuttle between marine terminals at Cascade Point and Slate Creek Cove (4 RT per day)	Same as B except daily crew shuttle service between Echo Cove and Slate Creek Cove; no landing craft ramp at Slate Creek Cove	Same as B

DTF - drystack tailings facility
TSF - tailings storage facility
RT - round trip

APPENDIX O

Permit No.: **AK-005057-1**

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act",

Coeur-Alaska, Inc.

is authorized to discharge from the **Kensington Project** located 40 miles north of Juneau, Alaska, at the following locations:

Outfall	Receiving Water	Latitude	Longitude
001	Sherman Creek	58° 52' 04"N	135° 06' 55"W
002	East Fork Slate Creek	58° 49' 58"N	134° 57' 58"W
003	Lynn Canal	58° 51' 58"N	135° 08' 28"W

in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective **September 1, 2005**

This permit and the authorization to discharge shall expire at midnight, **August 31, 2010**

The permittee shall reapply for a permit reissuance on or before **March 1, 2010**, 180 days before the expiration of this permit if the permittee intends to continue operations and discharges at the facility beyond the term of this permit.

Signed this **28th** day of July 2005.

/s/Michael Gearheard

Michael Gearheard
Director, Office of Water & Watersheds
Region 10
U.S. Environmental Protection Agency

TABLE OF CONTENTS

Cover Page 1
I. LIMITATIONS AND MONITORING REQUIREMENTS 3
A. Effluent Limitations and Monitoring - Outfall 001 3
B. Effluent Limitations and Monitoring - Outfall 002 7
C. Effluent Limitations and Monitoring Requirements - Outfall 003 10
D. Whole Effluent Toxicity Testing (WET) Requirements 11
E. Receiving Water Monitoring. 15
F. Quality Assurance Plan (QAP) 20
II. BEST MANAGEMENT PRACTICES PLAN 21
A. Purpose 21
B. Development and Implementation Schedule 21
C. Objectives 21
D. Elements of the BMP Plan 22
E. Documentation 23
F. BMP Plan Modification 23
III. MONITORING, RECORDING AND REPORTING REQUIREMENTS 24
A. Representative Sampling (Routine and Non-Routine Discharges) 24
B. Reporting of Monitoring Results 24
C. Monitoring Procedures 25
D. Additional Monitoring by Permittee 25
E. Records Contents 25
F. Retention of Records 25
G. Twenty-four Hour Notice of Noncompliance Reporting 25
H. Other Noncompliance Reporting 26

I. Changes in Discharge of Toxic Substances 26
J. Compliance Schedules 27
IV. COMPLIANCE RESPONSIBILITIES 27
A. Duty to Comply 27
B. Penalties for Violations of Permit Conditions 27
C. Need to Halt or Reduce Activity not a Defense 29
D. Duty to Mitigate 29
E. Proper Operation and Maintenance 29
F. Bypass of Treatment Facilities 29
G. Upset Conditions 30
H. Toxic Pollutants 30
I. Planned Changes 30
J. Anticipated Noncompliance 31
V. GENERAL PROVISIONS 31
A. Permit Actions 31
B. Duty to Reapply 31
C. Duty to Provide Informatio 31
D. Other Information 31
E. Signatory Requirements 31
F. Availability of Reports 32
G. Inspection and Entry 33
H. Property Rights 33
I. Transfers 33
J. State Laws 33
VI. DEFINITIONS 33
Appendix A: Maps showing sampling locations 36

I. LIMITATIONS AND MONITORING REQUIREMENTS

During the effective period of this permit, the Permittee is authorized to discharge pollutants from the outfalls specified herein to Sherman Creek, East Fork Slate Creek, and Lynn Canal within the limits and subject to the conditions set forth herein. This permit authorizes the discharge of only those pollutants resulting from facility processes, waste streams, and operations that have been clearly identified in the permit application process.

A. Effluent Limitations and Monitoring - Outfall 001

The permittee must limit and monitor discharges from outfall 001 as specified in Table 1, below. All figures represent maximum effluent limits unless otherwise indicated. The permittee must comply with the effluent limits in the tables at all times unless otherwise indicated, regardless of the frequency of monitoring or reporting required by other provisions of this permit.

1. Table 1

Table 1 - Outfall 011 Effluent Limitations and Monitoring Requirements

Parameter[1]	Hardness as mg/L $CaCO_3$	Units	Effluent Limitations		Monitoring Requirements		
			Max. Daily	Avg. Monthly	Sample Frequency[2]	Sample Location	Sample Type
Aluminum[3]	—	ug/L	143	71	weekly	Influent (I) /Effluent (E)	24 hr. comp.
Ammonia, Total	—	mg/L as N	4.0	2.0	weekly	E	24 hr. comp.
Arsenic	—	ug/L	—	—	monthly	I/E	24 hr. comp.
Cadmium[3]	50<H<100	ug/L	0.3	0.1	weekly	I/E	24 hr. comp.

Table 1 - Outfall 011 Effluent Limitations and Monitoring Requirements							
			Effluent Limitations		Monitoring Requirements		
Parameter[1]	Hardness as mg/L $CaCO_3$	Units	Max. Daily	Avg. Monthly	Sample Frequency[2]	Sample Location	Sample Type
	100≤H<200	ug/L	0.4	0.2	weekly	I/E	24 hr. comp.
	H≥200	ug/L	0.7	0.4	weekly	I/E	24 hr. comp.
Copper[3]	50≤H<100	ug/L	7.3	3.6	weekly	I/E	24 hr. comp.
	100≤H<200	ug/L	14.0	7.0	weekly	I/E	24 hr. comp.
	H≥200	ug/L	26.9	13.4	weekly	I/E	24 hr. comp.
Chromium, Total[4]	—	ug/L	—	—	weekly	I/E	24 hr. comp.
Chromium VI[4]	—	ug/L	16	8	—	I/E	24 hr. comp.
Iron	—	ug/L	1700	800	weekly	I/E	24 hr. comp.
Lead[3]	50≤H<100	ug/L	2.2	1.1	weekly	I/E	24 hr. comp.
	100≤H<200	ug/L	5.2	2.6	weekly	I/E	24 hr. comp.
	H≥200	ug/L	12.6	6.3	weekly	I/E	24 hr. comp.
Manganese	—	ug/L	—	—	weekly	I/E	24 hr. comp.
Mercury[3,5]	—	ug/L	0.02	0.01	weekly	I/E	24 hr. comp.
Nickel[3]	50≤H<100	ug/L	47.7	23.8	weekly	I/E	24 hr. comp.
	100≤H<200	ug/L	85.7	42.7	weekly	I/E	24 hr. comp.
	H≥200	ug/L	154.0	76.8	weekly	I/E	24 hr. comp.
Nitrate	—	mg/L as N	20	10	weekly	E	24 hr. comp.
Selenium[3]	—	ug/L	8.2	4.1	weekly	I/E	24 hr. comp.
Silver[3]	50≤H<100	ug/L	1.2	0.6	weekly	I/E	24 hr. comp.
	100≤H<200	ug/L	4.1	2.0	weekly	I/E	24 hr. comp.
	H≥200	ug/L	13.4	6.6	weekly	I/E	24 hr. comp.
Zinc[3]	50≤H<100	ug/L	66.6	33.2	weekly	I/E	24 hr. comp.

Table 1 - Outfall 011 Effluent Limitations and Monitoring Requirements

Parameter[1]	Hardness as mg/L $CaCO_3$	Units	Effluent Limitations		Monitoring Requirements		
			Max. Daily	Avg. Monthly	Sample Frequency[2]	Sample Location	Sample Type
	100≤H<200	ug/L	119.8	59.7	weekly	I/E	24 hr. comp.
	H≥200	ug/L	215.6	107.5	weekly	I/E	24 hr. comp.
TDS	—	mg/L	1000	1000	weekly	E	24 hr. comp.
TDS anions/ cations[6]	—	mg/L	—	—	quarterly	E	24 hr. comp.
Sulfate	—	mg/L	200	200	weekly	E	24 hr. comp.
Turbidity, effluent	—	NTU	see Permit Part I.A.5.		weekly	E	grab
Turbidity, natural condition	—	NTU	—	—	weekly	back-ground	grab
Hardness	—	mg/L $CaCO_3$	—	—	weekly	down-stream	grab
pH	—	s.u.	see Permit Part I.A.4		Continuous	E	Recorder
TSS	—	mg/L	30	20	daily	I/E	24 hr. comp.
Flow	—	gpm	--	—	Continuous	I/E	Recorder
Temperature	—	°C	—	—	Weekly	E	grab
Dissolved Oxygen	—	mg/L	—	—	Weekly	E	grab
Chronic Whole Effluent Toxicity[7] (WET)	—	TU_c	1.6	1.1	Monthly	E	24 hr. comp.

1 - Parameters must be analyzed and reported as total recoverable unless otherwise noted.

2 - Weekly sampling shall occur on the same day of each week, unless the Permittee can document that sampling could not be performed due to extreme conditions. In such cases, a detailed explanation of the reason sampling could not be performed shall be prepared and kept with the analytical results for that day.

3 - Reporting of a maximum daily limit violation is required according to Permit Part III.G.

4 - Chromium VI (Cr VI) must be analyzed during the next sampling event when results are received showing a total chromium measure exceeding 11 ug/L - the sample holding time for chromium VI is 24 hours. Cr VI must be analyzed and reported as dissolved.

5 - Mercury must be analyzed and reported as total.

6 - This monitoring shall include a standard and complete suite of those cations and anions contributing to TDS including but not limited to boron (B), sodium (Na), potassium (K), calcium (Ca), magnesium (Mg), fluoride (F), chloride (Cl), sulfate (SO_4), total alkalinity, hardness, pH, and electrical conductivity.

7 - See Permit Part I.D. for whole effluent toxicity testing requirements.

2. Until underground activities commence, the following monitoring frequencies shall apply. These frequencies shall also apply during a long term shut down of the mine. These frequencies shall be implemented after a 6 month closure period.

TABLE 2
Monitoring Requirements for Outfall 001
(During Non-Mining Periods)

Effluent Parameter[1]	Units	Monitoring Requirement	
		Sampling Frequency	Sample Type
Aluminum	ug/L	Quarterly	Grab
Ammonia, Total	ug/L	Quarterly	Grab
Arsenic	ug/L	Quarterly	Grab
Cadmium	ug/L	Quarterly	Grab
Copper	ug/L	Quarterly	Grab
Total Chromium	ug/L	Quarterly	Grab
Iron	ug/L	Quarterly	Grab
Lead	ug/L	Quarterly	Grab
Mercury[2]	ug/L	Quarterly	Grab
Nickel	ug/L	Quarterly	Grab
Nitrate	mg/L	Quarterly	Grab
Selenium	ug/L	Quarterly	Grab
Silver	ug/L	Quarterly	Grab
Zinc	ug/L	Quarterly	Grab
Total Dissolved Solids	mg/L	Quarterly	Grab
TDS anions/cations	mg/L	Annually	Grab
Sulfate	mg/L	Quarterly	Grab
Hardness[3]	mg/L	Monthly - Instream	Grab
pH[4]	s.u.	Quarterly	Grab
Total Suspended Solids	mg/L	Daily	Grab
Flow	MGD	Continuous	Recorder
Temperature	°C	Quarterly	Grab
WET, Chronic	TU_c[5]	Annually	Grab

1 The Permittee shall conduct analysis for total recoverable and dissolved.
2 Mercury shall be analyzed as total.
3 The Permittee shall sample the receiving water hardness downstream of the discharge.
4 The Permittee shall monitor and report the number of pH excursions outside the range of 6.5 to 8.5 Standard Units.
5 Chronic toxic units (See Definitions).

3. The permittee must not discharge any floating solids, visible foam in other than trace amounts, or oily wastes that produce a sheen on the surface of the receiving water.

4. The pH must not be less than 6.5 standard units (s.u.) nor greater than 8.5 Standard units (s.u.). During continuous monitoring required in Table 1, the Permittee shall monitor the total time outside the range for the month, the length of each excursion and the number of pH excursions outside the range of 6.5 to 8.5 Standard Units (s.u.). The Permittee shall report the total time outside the range for the month as well as the number of individual excursions which exceed 60 minutes.

5. The turbidity measured in nephelometric turbidity units (NTU) must not be more than 5 NTUs above the natural condition. The natural condition sample taken from Sherman Creek must be taken upstream of the discharge point within an hour of the effluent sample.

6. The permittee must collect effluent samples from the effluent stream after the last treatment unit prior to discharge into the receiving waters.

7. Minimum Levels. For all effluent monitoring, the permittee must use analytical methods that can achieve a minimum level (ML) less than the effluent limitation, if possible. For parameters that do not have effluent limitations, the permittee must

use methods that can achieve MLs less than or equal to those specified in Table 6 (Permit Part I.E.1.).

8. Chromium VI has an average monthly effluent limit that is not quantifiable using EPA approved or approvable analytical methods. EPA will use 10 ug/L (the ML for EPA Method 218.4) as the compliance evaluation level for this parameter.

9. For purposes of reporting on the DMR, for a single sample, if a value is less than the MDL, the permittee must report "less than (numeric value of the MDL)" and if a value is less than the ML, the permittee must report "less than (numeric value of the ML)." For purposes of calculating monthly averages, zero may be assigned for values less than the MDL, the (numeric value of the MDL) may be assigned for values between the MDL and the ML. If the average value is less than the MDL, the permittee must report "less than (numeric value of the MDL)" and if the average value is less than the ML, the permittee must report "less than (numeric value of the ML)." If a value is greater than the ML, the permittee must report and use the actual value.

B. Effluent Limitations and Monitoring - Outfall 002

The permittee must limit and monitor discharges from outfall 002 as specified in the Table 3, below. All figures represent maximum effluent limits unless otherwise indicated. The permittee must comply with the effluent limits in the table at all times unless otherwise indi-

cated, regardless of the frequency of monitoring or reporting required by other provisions of this permit.

1. Table 3

Table 3 - Outfall 002 Effluent Limitations and Monitoring Requirements					
Parameter[1]	Units	Effluent Limitations		Monitoring Requirements	
		Maximum Daily	Average Monthly	Sample Frequency[2]	Sample Type
Aluminum	ug/L	143	71	weekly	24 hr. comp.
Ammonia, Total	mg/L as N	3.5	1.7	weekly	Grab
Arsenic	ug/L	—	—	monthly	24 hr. comp.
Cadmium[3]	ug/L	0.2	0.1	weekly	24 hr. comp.
Copper[3]	ug/L	3.8	1.9	weekly	24 hr. comp.
Chromium, Total[4]	ug/L	—	—	weekly	24 hr. comp.
Chromium VI[3,4]	ug/L	16	8	—	24 hr. comp.
Iron	ug/L	1700	800	weekly	24 hr. comp.
Lead[3]	ug/L	0.9	0.5	weekly	24 hr. comp.
Manganese	ug/L	—	—	weekly	24 hr. comp.
Mercury[3,5]	ug/L	0.02	0.01	weekly	24 hr. comp.
Nickel[3]	ug/L	26	13	weekly	24 hr. comp.
Selenium[3]	ug/L	8.2	4.1	weekly	24 hr. comp.
Silver[3]	ug/L	0.4	0.2	weekly	24 hr. comp.
Zinc[3]	ug/L	37	18	weekly	24 hr. comp.
TDS	mg/L	500	500	weekly	24 hr. comp.
TDS anions/ cations	mg/L	—		quarterly	24 hr. comp.
Nitrates	mg/L	—		weekly	grab
Sulfates	mg/l	250	250	weekly	24 hr. comp.
Turbidity, effluent	NTU	see Permit Part 1.B.4.		weekly	grab
Turbidity, natural condition	NTU	—	—	weekly	grab
pH	s.u.	see Permit Part 1.B.3.		Continuous	Recorder
TSS	mg/L	20	30	daily	24 hr. comp.
Outfall Flow	gpm	1,100	—	Continuous	Recorder
Temperature	°C	—	—	weekly	grab
Hardness, as $CaCO_3$	mg/l	—	—	weekly	grab
Chronic Whole Effluent Toxicity[6]	TU_c	1.6	1.1	Monthly	24 hr. comp.

Table 3 - Outfall 002 Effluent Limitations and Monitoring Requirements
1 - Parameters must be analyzed and reported as total recoverable unless otherwise indicated.
2 - Weekly sampling shall occur on the same day of each week, unless the Permittee can document that sampling could not be performed due to extreme conditions. In such cases, a detailed explanation of the reason sampling could not be preformed shall be prepared and kept with the analytical results for that day.
3 - Reporting of a maximum daily limit violation is required according to Permit Part III.G.
4 - Cr VI must be analyzed during the next sampling event when results are received showing a total chromium measure exceeding 11 ug/L - the sample holding time for Cr VI is 24 hours. Cr VI must be analyzed and reported as dissolved.
5 - Mercury must be analyzed and reported as total.
6 - See Permit Part I.D. for whole effluent toxicity testing requirements.

2. The permittee must not discharge any floating solids, visible foam in other than trace amounts, or oily wastes that produce a sheen on the surface of the receiving water.

3. The pH must not be less than 6.5 standard units (s.u.) nor greater than 8.5 standard units (s.u.). The Permittee shall monitor the total time outside the range for the month, the length of each excursion and the number of pH excursions outside the range of 6.5 to 8.5 Standard Units (s.u.). The Permittee shall report the total time outside the range for the month as well as the number of individual excursions which exceed 60 minutes.

4. The turbidity measured in nephelometric turbidity units (NTU) must not be more than 5 NTUs above the natural condition. The background level for turbidity shall be measured at a point upstream of the dis-

charge point in the diversion around the TSF.

5. The permittee must collect effluent samples from the effluent stream after the last treatment unit prior to discharge into the receiving waters.

6. Minimum Levels. For all effluent monitoring, the permittee must use analytical methods that can achieve a minimum level (ML) less than the effluent limitation, if possible. For parameters that do not have effluent limitations, the permittee must use methods that can achieve MLs less than or equal to those specified in Table 6 (Permit Part I.E.1.).

7. Chromium VI has an average monthly effluent limit that is not quantifiable using EPA approved or approvable analytical methods. EPA will use 10 ug/L (the ML for EPA Method 218.4) as the compliance evaluation level for this parameter.

8. For purposes of reporting on the DMR, for a single sample, if a value is less than the MDL, the permittee must report "less than {numeric value of the MDL}" and if a value is less than the ML, the permittee must report "less than {numeric value of the ML}." For purposes of calculating monthly averages, zero may be assigned for values less than the MDL, the {numeric value of the MDL} may be assigned for values between the MDL and the ML. If the average value is less than the MDL, the permittee must

report "less than {numeric value of the may and if the average value is less than the ML, the permittee must report "less than {numeric value of the ML}." If a value is greater than the ML, the permittee must report and use the actual value.

C. Effluent Limitations and Monitoring Requirements - Outfall 003

The permittee must limit and monitor discharges from outfall 003 as specified in the Table 4, below. All figures represent maximum effluent limits unless otherwise indicated. The permittee must comply with the effluent limits in the table at all times unless otherwise indicated, regardless of the frequency of monitoring or reporting required by other provisions of this permit.

1. Table 4:

Table 4

Parameter	Units	Effluent Limitations			Monitoring Requirements	
		Maximum Daily	Avg. Monthly	Weekly Avg.	Sample Frequency	Sample Type
Flow	gpd	60,000	30,000	—	Daily	Recording
Biochemical Oxygen Demand (BOD_5)	mg/L	60	30	45	Weekly	Grab
Total Suspended Solids (TSS)	mg/L	60	30	45	Weekly	Grab
Fecal Coliform	#/100 ml	150,000	100,000	—	Weekly	Grab
Chlorine[1]	mg/L	0.02	—	—	Weekly	Grab
pH	s u	See Permit Part I.C.3			Weekly	Grab

1 - Monitoring required only if chlorine is used. See Permit Part I.C.6., below.

2. The permittee must not discharge any floating solids, visible foam in other than trace amounts, or oily wastes that produce a sheen on the surface of the receiving water.

3. The pH must not be less than 6.5 standard units (s.u.) nor greater than 8.5 standard units (s.u.).

4. Influent (prior to treatment) measures of BOD_5 and TSS shall be done on a quarterly basis. From this information, percent removal shall be calculated and reported on the DMR in January, April, July, and September for the previous quarter. Percent removal shall meet or exceed 85% for both ...

APPENDIX P

DECLARATION OF JOE KAHKLEN

JOE KAHKLEN declares under penalty of perjury as follows:

1. My name is Joe Kahklen. I reside at 800 F Street, Unit D6, Juneau, Alaska, 99801. I am the Chairman of the Board of Directors of Goldbelt, Incorporated ("Goldbelt"). I am making this declaration in support of the Motion of Goldbelt to intervene as a defendant in this litigation.

2. I am a Tlingit Indian. The name Tlingit translates roughly to "the real people." My traditional name is Kokeesh, my moiety is Raven, and my clan is Dog Salmon. I was the first CEO and President of Goldbelt when it was formed in 1974, and I have been active in corporate affairs ever since.

3. Berners Bay and surrounding lands, including Cascade Point and the lands on which the Kensington Gold Project will be developed are within the aboriginal territory of the Auk Kwaan Tlingit, whose descendants are the modern day shareholders of Goldbelt.

4. Berners Bay is an important subsistence hunting and fishing area for Juneau Tlingit. Goldbelt would not be a party to any development that significantly impacted use of the area for subsistence activities. Goldbelt and its shareholders have participated in the process of assessing the environ-

mental impacts of the Kensington project - including the impacts of constructing the Cascade Point dock and transporting mine workers across Berners Bay. Goldbelt and Coeur have agreed to extraordinary mitigation measures to insure that the resources of Berners Bay will not be harmed. Significantly, the plaintiffs do not challenge the adequacy of the Supplemental Environmental Impact Statement, which concluded that with the mitigation required by the Forest Service's decision, the impacts of the project on Berners Bay will be minimal.

5. In the years since first contact with non-Native cultures, Tlingit lands, including Berners Bay, were encroached upon and wrongfully appropriated by individuals in populated areas, such as Juneau, and by the United States government for inclusion in the Tongass National Forest. The Tlingit received partial compensation for the loss of their lands as a result of a judgment issued by the United States Claims Court in 1968.

6. In 1971, Congress further addressed the issue of Alaska Native land claims by enacting the Alaska Native Claims Settlement Act ("ANCSA"), which granted some 45 million acres of land and $1 billion as compensation for the extinguishment of Native aboriginal title. In order to receive benefits under ANCSA, Alaska Natives were required to organize as corporations under Alaska law. Land entitlements were organized primarily around traditional village sites, with village corporations receiving surface estate and regional corporations the subsurface estate. Because the territory of Tlingit in the Juneau area had been subsumed into the City and Borough of Juneau, however, Tlingit in the Juneau area (along with three other communities) were -incorporated

under a separate section of ANCSA into so-called "urban corporations," with the right to select 23,040 acres of land in reasonable proximity to their municipalities. Congress expected that these lands would be selected for their economic potential, which, in Southeast Alaska at the time meant timber.

7. In 1974, the Juneau area Tlingit organized Goldbelt Incorporated, which currently has more than 3,000 shareholders. In due course the Secretary of the Interior made withdrawals of land for selection by Goldbelt, including lands on Admiralty Island within the Admiralty Island National Monument. Environmental groups, including the Sierra Club (which is a plaintiff in this litigation) immediately brought suit challenging the legality of the Admiralty Island withdrawals. To avoid the delay and expense of that litigation, in 1979 Goldbelt agreed to exchange its Admiralty Island selections for less sensitive lands on the mainland, including approximately 1,000 acres of land on and around Cascade Point on the south shore of Berners Bay.

8. The Berners Bay lands, which have high values because of their easy access from the Juneau road system, are critical to the economic future of Goldbelt and its shareholders. In recognition of this fact, the City and Borough of Juneau has designated portions of Goldbelt's lands near Cascade Point as a "new growth area," and Goldbelt, at great expense, has developed a phased plan for development of the area, beginning with dock facilities at Cascade Point. A dock at this location would have substantial value as a ferry terminus to northern Lynn Canal and the communities of Haines and Skagway, as a service site for fishing vessels, and as an embarkation point

for whale watching and other tourism activities, in addition to servicing the Kensington Mine.

9. Having, in effect, forced Goldbelt off of Admiralty Island and into Berners Bay and Cascade Point in particular, the same environmental groups, lead by the plaintiffs in this litigation, have bitterly opposed every effort of Goldbelt to realize any economic benefit from its Berners Bay lands. In 1998, these group successfully opposed Goldbelt's application for a dredge and fill permit to construct a dock at Cascade Point. The Corps of Engineers' decision was based in part on a finding that there was no demonstrated public or economic need for a dock at that time. That requirement is presently satisfied by the inclusion of the Cascade Point marine terminal in the Kensington Gold Project Plan of Operations and the need to ferry workers to the mine site.

10. In 1999, SEACC and the Sierra Club appealed a Forest Service decision authorizing construction of a right-of-way to allow administrative access to Goldbelt's lands at Cascade Point.

11. The marine terminal cannot be constructed without a conditional use permit ("CUP") from the City and Borough of Juneau ("CBJ"). SEACC strenuously opposed Goldbelt's application for a CUP. When it became clear that a permit would be granted, SEACC succeeded in having the CBJ Planning Commission and Assembly insert a condition in the CUP that the dock could be used solely to transport workers via a single ferry to the Kensington mine site. So conditioned, the CUP was granted on October 15, 2004.

12. In 2003, Goldbelt once again applied for a dredge and fill permit to construct a dock at Cascade Point to serve as a marine terminal for transporting

workers to the mine site. Although the 404 permit application was in the name of Goldbelt as the property owner, the dock is an integral part of the Kensington Gold Project Plan of Operations. The environmental impacts of the dock were considered in the Supplemental Environmental Impact Statement prepared for the Plan of Operations and associated federal permits. On July 15, 2005, the Corps issued a 404 permit for the Cascade Point marine terminal. The Corps has advised Goldbelt, however, that use of the dock for any purpose other than mine worker ferry operations, as required in Goldbelt's CUP from CBJ, may require re-noticing and amendment of the Corps' permit. Goldbelt has expended considerable time, effort and resources in pursuing a permit for a marine terminal at Cascade Point in reliance on Coeur's plans for the Kensington Mine.

13. As a consequence of SEACC's opposition, Goldbelt's proposed Cascade Point dock is a dedicated facility that is only viable if the mine goes into operation. If SEACC, the Sierra Club and Lynn Canal Conservation succeed in invalidating the Plan of Operations and blocking construction of the Kensington Mine, the practical and legal effect will be to block construction of the Cascade Point dock, as well. A recent Op-Ed piece by a representative of plaintiff Lynn Canal' Conservation (Attachment A) makes it clear that stopping the commute of mine personnel between Cascade Point and Slate Creek Cove is a principal, if indirect, aim of the litigation. SEACC has formally requested the Corps of Engineers to reconsider and deny Goldbelt's 404 permit for Cascade Point on the ground that the dock is dedicated to mine service (thanks to their efforts) and Coeur could transport workers from another site (Yankee Cove) not owned by Goldbelt. Attachment B.

14. In all its proposals for development of the Kensington mine, Coeur Alaska has shown sensitivity to the needs of the Native Community. In 1996, Coeur entered into an agreement with a consortium of Southeast Alaska Native organizations, including Goldbelt that, among other provisions, gives a bidding preference to members of the coalition in contracts for construction and servicing the mine. Because Goldbelt is the Native Corporation in closest proximity to the Kensington mine, in 2000, Goldbelt and Coeur entered into a separate agreement contemplating leases of land (including the Cascade Point dock site) and future contracting consideration, including contracting for worker transportation and ferry service across Berners Bay for commuting Coeur employees. Coeur's Plan of Operations, under challenge in this litigation, is premised on use of Cascade Point and ferry service provided by Goldbelt. Thus, the litigation threatens a direct an immediate economic impact to Goldbelt.

15. Coeur has also made commitments for local and Native training and hire. Unemployment and underemployment among Goldbelt shareholders is significantly higher than for non-Natives. Many of the jobs that are available to Goldbelt shareholders are in the seasonal tourism industry, where wages are low and fringe benefits are not customary. The Kensington mine represents the most promising new source of meaningful, well paying jobs with benefits for our shareholders.

16. To summarize, the pending litigation is just the latest in a consistent series of actions by the plaintiffs designed to prevent any and all development of Goldbelt's lands at Berners Bay. Their efforts to derail the Kensington Mine, if successful,

will not only kill Goldbelt's dock at Cascade Point, but also will deliver a crushing blow to the hopes of Goldbelt and its shareholders to benefit from the economic prosperity that the mine would bring to the community of Juneau.

17. Because of its historical roots in Berners Bay and its involvement in the permitting process, Goldbelt is in a position to provide the court with information that may not be available to other parties. Paragraph 83 of the complaint, for example, contains misleading information concerning the importance of Cascade Point as a herring spawning area. Dive surveys performed by Goldbelt and provided to the Corps of Engineers demonstrate that the small amount of herring spawning habitat that will be impacted is marginal. The Alaska Department of Fish and Game reports that Cascade Point is used infrequently for spawning. Because of the importance of the mine to Goldbelt and its shareholders, Goldbelt is also in a unique position to provide the Court with information concerning balancing of the equities.

18. No other party can adequately represent Goldbelt's interests in this litigation. The primary interest of the federal agencies and the State of Alaska is in defending the permitting process. They will not be harmed if the mine is enjoined. Coeur's principal interest is in opening and operating the mine. Transportation and housing of employees are subsidiary issues. The plaintiffs have argued that transportation and housing could be accommodated in several ways that would not require a marine terminal at Cascade Point -- such as transportation by helicopter (Alternative A, or the "no action" Alternative favored by plaintiffs) or use of the permitted

dock facility at Yankee Cove outside Berners Bay on Lynn Canal. These alternatives are more costly, less effective to the purposes of the Plan of Operations, and involve significantly higher safety risks. Nevertheless, at some point, one of these alternatives might seem to Coeur preferable to the costs and uncertainty of protracted litigation.

DATED this 12th day of October, 2005, at Juneau, Alaska.

/s/Joe Kahklen
Joe Kahklen

APPENDIX Q

REVISED
DEPARTMENT OF THE ARMY
RECORD OF DECISON
&
PERMIT EVALUATION

APPLICANT: COEUR ALASKA, INCORPORATED and Goldbelt, Incorporated

APPLICATION NO.: POA-1990-592-M and POA-1997-245-N

WATERWAY: Lynn Canal and Berners Bay

This document constitutes the United States (U.S.) Department of the Army, Corps of Engineers' (Corps) Record of Decision (ROD), compliance determination according to the National Environmental Policy Act (NEPA), the U.S. Environmental Protection Agency's (USEPA) Section 404(b)(1) Guidelines[1] (Guidelines), and the public interest review for Coeur Alaska, Incorporated, (hereafter referred to as "Coeur"), proposed Kensington Gold Project.

The U.S. Forest Service (USFS) initiated the NEPA process to identify and analyze alternatives to the amended Mining Plan of Operation submitted to the USFS for the operation of the Kensington Gold Mine. The USFS was the lead Federal agency for the project, and the Corps was a cooperating agency to the Environmental Impact Statement (EIS) published in

[1] 40 CFR 230

February 1992, and to the Supplemental EIS (SEIS) dated August 1997. The Corps has been a cooperating agency on and throughout the current Final SEIS (FSEIS) process, which was completed in December 2004, when the USFS published the FSEIS and the USFS' ROD. Alternative D is the USFS's preferred alternative and has been adopted by Coeur.[2] The Corps authorized Alternative D, to two different permittees in separate permits (e.g., to Coeur for the Kensington Gold Project and to Goldbelt, Incorporated (hereafter referred to as 'Goldbelt") for the Cascade Point marine facility).

The aforementioned documents[3] included a complete project impact analysis and review of the direct, secondary, cumulative, and reasonably foreseeable impacts of the project as well as pertinent alternatives. These analyses have also resulted in minor changes to the proposed activities.

I have independently reviewed and evaluated the information in the EIS, the DSEIS and the FSEIS, in accordance with 40 CFR 1506.3 and 33 CFR 230.21, and have found them to be accurate assessments, and therefore appropriate for the purposes of the

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[2] The applicant had originally applied for Alternative B (described in Section VI, later in this ROD), Alternative D was not in the Draft of the FSEIS, hereafter referred to as the DSEIS, but originated later as a result of comments received from Federal, State and local agencies, as well as the land manager (USFS), with respect to the DSEIS.

[3] These documents are all available at the USFS, 8465 Old Dairy Road, Juneau, AK 99801. A copy of each was incorporated into the case file.

public interest review and alternatives analysis required by 33 CFR 320.4(b)(4) and 40 CFR 230.10. The Corps hereby adopts the FSEIS for the Kensington Gold Project, and those parts of the Kensington Gold Project EIS and SEIS not changed by the FSEIS.

I. **DECISION:** I have decided, in light of the overall public interest, to issue two Corps permits pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), and pursuant to Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) (10/404 permit). One permit will be issued to Coeur to authorize the discharge of processed mine tailings into Lower Slate Lake, and the discharge of fill materials into waters of the U.S. to construct a marine dock facility at Slate Creek Cove in accordance with the attached drawings (Attachment E), Alternative D in the FSEIS and this ROD.

The second permit will be issued to Goldbelt for the Cascade Point Docking Facility. See Plans of Goldbelt, attachment A.

The Corps' ROD is based upon information contained in the EIS, DSEIS, the FSEIS and the USFS's ROD, the stated views of Federal, State, local agencies, the interested public, current national policy and applicable laws and regulations. This decision has been made in conformance with the USEPA memorandum, entitled, "Clean Water Act Regulation of Mine Tailings", dated May 17, 2004. The possible consequences of all alternatives, including the USFS's preferred alternative, have been evaluated in terms of environmental effects, social well-being, and the

public interest. All factors[4] which may be relevant to my decision were considered, including the cumulative effects thereof. These factors included, but were not limited to conservation, economics, aesthetics, general, environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, mineral needs, consideration of property ownership, and in general, the needs and welfare of the people.

Turbidity, total suspended solids (TSS), aluminum, and chromium are the principal components and elements of concern within the tailing storage facility (impoundment). The tailings deposited into the impoundment will have been processed to remove sulfides and the contained gold. The ore will be crushed and ground, with the sulfides and gold mineralization removed by a floatation circuit. This would leave trace concentrations of metals bearing sulfides, metal oxides, metal sulfates, and carbonate salts. Up to 40% of the tailings will be placed back underground in a wetted cement mixture. No cyanide or arsenic will be added to the ore as a reagent to recover gold. In fact, the gold concentrate will be shipped offsite for final recovery. The water in the impoundment will not be directly discharged into

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[4] These and other factors, which were addressed in the DSEIS and FSEIS, Chapters 3 (Affected Environment) and 4 (Environmental Consequences), which adequately addressed the environmental and public Interest factors. No new factors have been identified as a result of this review.

any receiving water. The water from the tailings storage facility will be pumped by pipeline to a water treatment facility before discharge to the East Fork of Slate Creek. To ensure water quality standards for the project are met, all water from the impoundment will have to go to and through a water treatment plant during operation. The discharge from the water treatment plant is subject to an NPDES permit. To ensure that the tailings are reclaimed in accordance with approved plans, the USFS and ADNR will hold reclamation bonds on the operation to ensure that all reclamation standards are met. See Section XI, Subpart G.

Attachments to Record of Decision:

A. Plans of Goldbelt
B. Kensington Mine Section 404(b)(1) analysis.
C. List of Reference Documents
D. Revised Special Conditions for Coeur permit
E. Revised permit application tables and drawings, Coeur
F. Signed Department of the Army Permit Evaluation and Decision Documents for Goldbelt, Incorporated: (1) POA-1997-245-2 (Cascade Point Dock), and (2) POA-1997-245-M (Road from Echo Cove to Cascade Point),
G. The Section 404(b)(1) Analysis and Public Interest Review for POA 1997-245-N (Cascade Point Dock).

The documents listed in Attachment C were submitted to the Corps by the applicant and by various Federal and State agencies as supporting documents, and specified documents or portions of the listed documents have been incorporated into this ROD by reference.

II. PROPOSED PROJECT: The location and description of the proposed work was described in the Corps public notice, dated June 21, 2004. The 45-day comment period, originally commensurate with the comment period of the DSEIS, was later extended at the request of various Federal resource agencies to August 20, 2004.

Coeur's proposal is to mine gold from subsurface mineral deposits located within the Tongass National Forest on Federal and private patented lands, just north of Berners Bay, Alaska.

Coeur proposed[5] in June 2, 2004 in a revised application to place structures, and to discharge an approximate total of 5,451,700 cubic yards (cy) of fill material into an approximate total of 91.7 acres of waters of the U.S., including wetlands, in conjunction with the construction of the following new mine facilities and associated infrastructure:

Proposed Facilities	Acres of US Waters To Be Impacted	Proposed Fill Volume (cy)
Process Area	5.3	88,000
Tailing Dam	1.4	145,000
Access Road	12.0	26,000
Laydown Area	5.0	4,800
Waste Rock Disposal	4.8	311,000
Borrow Areas	4.2	0
Mine Tailings	45.5	4,800,000
Tails Placement Facilities	8.9	15,000
Topsoil Stockpile	1.0	33,000
Slate Creek Terminal	3.6	28,900
TOTAL	91.7	5,451,700

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[5] The location and description of the proposed work was described in the Corps public notice, dated June 21, 1004.

These activities included the discharge of fill material in waters of the U.S., and the placement of several structures (floats, docks and piles) in navigable waters of the U.S., in conjunction with the construction of a marine dock facility in Slate Creek Cove.

The individual components of the proposed work included the following activities: (1) the construction of building pads for milling facilities, administrative, and support facilities; (2) construction of a tailings dam; (3) construct fill pads associated with the tailings pipeline, access roads, a discharge pipe, and a pump-back sump (located at the toe of the proposed dam); (4) construction of a waste rock disposal site; (5) construction of abutments for the main access road, which would run from Slate Creek Cove to the process area, plus fills associated with the construction of various bridges (abutments, etc.); (6) construction of a staging and laydown area, as well as an infiltration gallery in Johnson Creek; (7) approximately 4,800,000 cy (or 4.5 million tons) of fill material would be discharged into approximately 45.5 acres of waters of the U.S.; (8) material and topsoil stockpiles for use in concurrent and closure reclamation activities; (9) construction of 2-foot high berms encircling settling and storage ponds; and, (10) construction of a marine dock facility in Slate Creek Cove. Galvanized metal piling would be used to anchor various floating components of the dock facility.

Coeur did not include the Cascade Point docking facility in their Department of the Army (DA) permit application. The Cascade Point docking facility application was submitted separately by Goldbelt, Incorporated, and previously evaluated as an inde-

pendent activity by the Corps in our decision document for that project. This ROD now analyzes Cascade Point as a component of the Kensington Gold Project. Two different permit decisions are being made; one for the Kensington Mine Project, and another for a docking facility at Cascade Point. We re-examined our previous conclusion that the Cascade Point facility was a separate and independent project. Based on a review of all available information including, but not limited to, the FSEIS, Goldbelt's submissions, and the City & Borough of Juneau's Conditional Use permit, we determine that, without the Kensington Mine, the Cascade Point facility would not be constructed in the foreseeable future. Although we recognize that Goldbelt intends the dock to be used for other purposes in the future, such plans are insufficient for us to evaluate it as an independent activity. We therefore conclude that a destination docking facility at Cascade Point is a component of the Kensington Mine project. It is analyzed in the FSEIS, this ROD, and in attachments F (as modified by attachment G) and G (both incorporated into this ROD).

The applicant originally applied for Alternative B, as reflected in the Corps public notice, stating that approximately 5,451,700 cubic yards of fill material would be discharged into 91.7 acres of waters of the U.S., including wetlands. The applicant later adopted the USFS's preferred Alternative D, with the volumes and acreages described in Section VI below, prior to publication of the FSEIS.

III. PURPOSE AND NEED FOR ACTION: The basic purpose is to develop a working, profitable gold mine for the Jualin/Kensington ore body. This will be accomplished by extracting the gold ore and reducing

it by removal and disposal of non-marketable components, and by transporting the gold concentrate to market. There are several transportation links and construction activities implicit in the overall mining operation.

The overall mine operation project would need the following components: (1) building pads for milling facilities, administrative and support facilities; (2) tailings disposal facilities; (3) fill pads associated with pipelines; (4) a waste rock disposal site; (5) access roads and bridge abutments; (6) staging and laydown areas; (7) an infiltration gallery; (8) material and topsoil stockpiles; (9) two marine dock facilities; and (10) berms to encircle settling and storage ponds.

Coeur's need is to relocate[6] the major mine components from the Kensington Mine site adjacent to Lynn Canal, to the Jualin Mine site location in the Johnson Creek watershed (approximately two miles to the southeast across a southern ridge extension of Lion's Head Mountain), and at Slate Cove, on the northwest side of Berners Bay. This action would allow Coeur to transport ore from the mine directly[7] to a mill on the Jualin side of the peninsula for process-

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[6] The locations of certain structures, as yet not constructed, were referenced in the previous Corps authorization. The current proposal would relocate these structures on 'paper' to new locations.

[7] The 'high-grade' ore body that would be mined is located on the eastern side of Lions Head Mountain. Thus, locating the mill on the eastern side would shorten the distance from ore body to portal to mill.

ing, from where the processed tailings material slurry would then be piped by gravity feed directly to the alpine lake disposal site (Lower Slate Lake). Coeur needs to establish a marine dock facility in Slate Creek Cove for the transport of mine personnel safely to another destination port and move gold concentrate efficiently and reliably off the mine site.

IV. SCOPE OF ANALYSIS [33 CFR 325, Appendix B, 7(b)]: When an applicant proposes to conduct a specific activity (e.g., the actions proposed by Coeur in the Corps' public notice, dated June 21, 2004), requiring authorization from the DA, and it is merely one component of a larger project (e.g., an ongoing mining operation), the District Engineer (DE) shall establish the scope of the ROD and/or permit evaluation assessment to address the impacts of the specific activity requiring Corps authorization and those portions of the entire project over which the DE has sufficient control and responsibility to warrant Federal review. Sufficient control and responsibility is considered to exist for portions of the project beyond the Corps' jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are situations where the environmental consequences of the larger project are essentially products of the Corps' permit action. (See 33 CFR 325 Appendix B, Paragraph 7.b.)

For this proposal, works initially identified as requiring Corps authorization are limited to the placement of structures, and the discharge of dredged or fill material into waters and navigable waters of the U.S.

However, the DE is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal in-

volvement is sufficient to turn an essentially private action into a federal action. These are cases where the environmental consequences are essentially products of the Corps permit action. Typical factors to be considered in determining whether sufficient control and responsibility exists include (1) whether or not the regulated activity is 'merely a link' in a corridor type project; (2) whether adjacent uplands in the immediate vicinity of the regulated activity affected the locations and configuration of the regulated activity; (3) the extent to which the entire project will be within the Corps jurisdiction; and (4) the extent of cumulative Federal control and responsibility.

Combined Federal controls are influenced by the fact that the work would be conducted in part on Federally administered lands (Tongass National Forest – USFS), and in part on State of Alaska administered lands (Alaska Tidelands – marine dock facility); the water leaving the impoundment behind the dam is subject to the (USEPA) regulations (i.e., subject to the USEPA's authorization to discharge under the National Pollutant Discharge Elimination System (NPDES Permit); and other Federal laws (e.g., Endangered Species Act, Fish and Wildlife Coordination Act, the National Historic Preservation Act, the Marine Mammal Protection Act, the Coastal Zone Management Act, etc.).

There are alternatives available to the applicant, that would allow various activities of the Kensington Gold Project to function without the need for Corps authorization, e.g. use of uplands[8],[9]. Additionally,

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[8] FSEIS, Section 2.2, Overview of Project Alternatives.

logistics, technological or economic concerns, and/or other Federal or State regulatory findings could affect the practicability of some of the listed alternatives.

The scope of analysis for this action includes not only the impacts, alternatives, and project benefits resulting from the primary proposed actions (two marine docking facilities and a mine tailings disposal site) as identified above, but also the infrastructural items, e.g., the road system, pipelines, and material stockpile sites. Other project-related impacts not within the scope or a product of Corps authorization have been summarized and identified in the direct, secondary and cumulative impact analysis sections of the FSEIS.[10]

V. **BACKGROUND:** In July of 1992, the USFS approved a Plan of Operations (POO) for the Kensington Gold Project. The POO called for underground mining; ore processing with on-site cyanidation; a tailings impoundment; marine discharge of process wastewater; and various support facilities, including the use of liquefied petroleum gas for power generation. Comet Beach was the proposed landing site for all supplies and fuel. A man camp was proposed for the workers. The Corps evaluated a DA permit application for the creation of an impoundment in Sherman Creek Valley, and the disposal of mine tailings behind that dam. The Corps completed a public notice, public meetings, public

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[9] ROD, Section VI. Alternatives, below.

[10] See FSEIS, Section 4.21, Cumulative Effects.

hearings on this proposal, but never issued a DA permit for that facility.

In August 1997, the USFS approved a revised POO for the Kensington Gold Project. The modified plan called for off-site processing of a floatation derived gold concentrate; placement of tailings in a dry tailings facility accessed through a pipeline, with 25% of tailings to be paste (wetted cement mixture) backfilled in the underground workings; diesel fuel would be used for power generation; and the tailing slurry would be piped to a dewatering plant and the reclaimed water returned for reuse. Comet Beach was the proposed landing site for supplies and fuel. A camp was proposed for the workers. The Corps of Engineers received a DA permit application for this new facility design. The Corps completed a public notice, public meetings, and public hearings on this proposal. After a thorough evaluation of the project the Corps of Engineers issued a permit for the dry tailings facility and the support infrastructure.

Between the times the 1997 FSEIS evaluated the Kensington Mine Project and the revised Kensington Mine Project proposal in 2001, Coeur gained control of the Jualin Mine site and this changed the land status and gold resource calculations which resulted in a need to modify the Plan of Operation. The previous P00 sited all of the mining and milling operations on west side of Lion's Heads Mountain ridge with access and support facilities located at Comet Beach on Lynn Canal. In the 2004 FSEIS, this scenario is represented by all "A" Alternatives. The 2001 revised POO resulted in the siting of the marine dock facility, the mill, access road, and wet tailings storage facility on the east side of Lion's Heads Mountain ridge. Except for the eventual con-

nection by indirect tunneling for air flow purposes, support of waste rock disposal resulting from edit development (tunneling), and water treatment facilities located on the west side, no alternatives were contemplated or considered for a split operation, e.g. a mill operation on one side of the ridge and tailings disposal on the other. Comet Beach would still be used for support of the west side developments.

In November 2001, Coeur submitted an amendment to its approved 1998 Plan of Operations to the USFS. The amendment modified site access and eliminated the dry tailings facility in favor of placing the tailings into an impoundment in Lower Slate Lake. With the elimination of the dry tailings facility (113 acres in size), two gravel borrow areas (totaling 43 acres), which were located underneath wetlands, were also eliminated. The ore would go through a floatation circuit and the concentrate would be shipped offsite for processing. The proposal included 40% of the tailings being placed underground as a paste backfill. The mine site now includes both the Kensington and Jualin sites. Access to the-mine site would be from the Jualin side, and include a marine dock facility in Slate Creek Cove off of Berners Bay. A daily commute for the mine workers was proposed, and the man camp eliminated from the proposal. In December of 2004, the USFS finalized the Supplemental Environmental Impact Statement and issued their Record of Decision for the modified Kensington project. The DA has been a cooperating agency on the SEIS for this project and this ROD constitutes the Corps decision on the latest mine project design proposal.

VI. ALTERNATIVES CONSIDERED:

For the reasons discussed below, the Corps has concluded that alternative D with the inclusion of the water treatment plant and water diversion is the least environmentally damaging practicable alternative. The No Action Alternative (listed as Alternative A in the FSEIS) is not environmentally preferable for the reasons discussed in Section VII below. Since Alternative D has the least environmental impact, it is the environmentally preferable alternative. This section discusses two categories of alternatives. The first category is alternatives for a tailings facility with related components. The second is alternative docking destinations.

Determination of the Corps' Jurisdiction. The USFS conducted wetland and vegetation mapping of the Alternative A lands (located in the Sherman Creek and Sweeney Creek watersheds) and published the results in the 1992 EIS[11], for the Kensington Gold Project. The USFS' mapping method was the procedure outlined in the 1989 *Federal Manual for Delineating Jurisdictional Wetlands*. However, "Since that time, the 1992 Energy and Water Development Appropriations Act mandated the use of the 1987 Corps of Engineers Wetlands Delineation Manual for wetland delineations instead of the Federal Manual for Delineating Jurisdictional Wetlands (Federal Interagency Committee for Wetland Delineation, 1989). The Corps of Engineers has reevaluated the August 1990 wetland delineation performed for the Kensington Project, and as a result has determined that the wetland determinations

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11 FEIS, Chapter 3, Vegetation, pages 3-45 through 3-48.

would remain the same based on the 1987 manual."[12] The Corps conducted an onsite field visit on August 6, 1996, to verify the wetland delineation prior to giving approval.[13]

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[12] FEIS, Chapter 3, Vegetation, pages 3-45 through 3-48.

[13] See Corps' Memorandum dated August 12, 1996, file number POA-1990-592-D.

... safety problems, which is an unacceptable risk to workers. Also, see Section VIII of this ROD for a discussion of cost issues.

Conclusion. The Corps has considered the potential alternative destinations listed above and concluded that the proposed Cascade Point docking facility is the least environmentally damaging practicable alternative destination docking facility. Three docking facilities were considered reasonable in terms of proximity to the Slate Creek Cove dock. The Corps has determined Cascade Point, Echo Cove, and Yankee Cove to be reasonable alternative destination docking facilities in terms of proximity, because they are close enough to the north end of Berners Bay to allow for daily commuting. The other sites discussed above are more distant and would not allow for daily commuting. This is because more than a three-hour commute results in more than a 14 hour workday for the miners, and is unsafe, Reference the memorandum to the file, entitled, "Coeur Miner's Work Day", dated February 14, 2006. Use of the more distant docking facilities would therefore require construction of a residential camp near the mine site, at greater expense and environmental impact.[49] The more distant docking facilities are not practicable destinations and were not carried forward for further review. Use of Yankee Cove would result in more exposure to rough seas in Lynn Canal. The Lynn Canal route (outside Berners Bay) would be dan-

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49 Kensington Gold Project, Corps of Engineers 404(B)(1) Practicability Analysis, Prepared by Coeur, October 2004.

gerous and unavailable for worker transport over extended winter periods. For this reason, the Corps does not consider Yankee Cove a practicable destination port. Therefore, Cascade Point and Echo Cove are the only remaining destinations that are practicable. Of these two practicable alternative destinations, Cascade Point is the least environmentally damaging, and thus is the environmentally preferable alternative. The environmental impacts of each are described above.[50]

VII. ANALYSIS OF THE LEAST ENVIRONMENTALLY DAMAGING[51] PRACTICABLE ALTERNATIVE[52]

Permanent Losses.[53] All variants of the Dry Tailings Facility would result in the permanent loss of 34 to 113 acres of aquatic habitat (special aquatic site), which consists of forested and scrub-shrub wetlands. The wetland functional values of the Dry Tailings Facility were determined to be medium for wildlife

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[50] See Attachments B (Section 404(b)(1) Analysis), and G. Also, see Section XI, later in this ROD.

[51] The majority of the wetlands to be impacted would be heavily forested, with some scrub shrub mix. Other wetlands (Wet Tailings Storage Facility) would be lake oriented (e.g., lacustrine emergent. This was discussed in the FSEIS, and summarized in the Summary of Potential Impacts of Each Alternative, under the headings of Resources, and impacts (by function and value).

[52] See 404(b)(1) Evaluation.

[53] FSEIS, Chapter 3, Section 3.12.3, and Chapter 4, Section 4.12.3.

habitat, production export and flood flow alteration, and low for riparian support. Placement of fill material into this area would reduce these wetland functions to zero. Upon final reclamation, the Dry Tailings Facility might regain some habitat value, but no wetland functions. This would not be expected to occur in the short term.

The functional value at the Dry Tailings Facility site as well as at the site of the connecting road system would cease immediately with the initial mechanical land clearing operations. The continued presence of humans and equipment would ensure that the project site was devoid of all habitat values, or 'zero-function'.[54] Once all fill material has been discharged, and after reclamation activities have been completed, and the area has been deserted by humans, other functions (e.g., wildlife habitat) would develop over time. These would be functions specific to an upland, non-forested habitat, and the conversion of wetlands to uplands would be permanent.

Under Alternatives A through A-3, additional waters, including wetlands, would not be reclaimed for all other project component areas. Some permanent loss (up to approximately 70 acres) would remain in addition to the DTF. These areas have similar functions and values to the DTF area, with some higher value areas near Sherman creek.

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[54] Zero-function is defined here as having no vegetation or water sources present, and having only bare ground and therefore providing no habitat functions such as food sources, cover from predation, nesting sites, etc., all of which is supportive of wildlife and/or fish populations.

Construction of the Wet Tailings Storage Facility would result in the permanent loss of 3.44 acres of aquatic habitat (within the footprint of the dam). This includes high value wildlife habitat.

The docking facility at Cascade Point will require permanent filling of approximately 1.3 acres of marine waters. This location has a rocky sand and gravel substrate with some fucus and kelp plant communities. It provides some herring spawning habitat. Some recolonization of this plant life is expected after placement of fill. The loss of this area is small in the context of Berners Bay and is considered a minimal loss of functions and values.

Temporary losses: The FSEIS stated that "For the purposes of this analysis, it is expected that all fish and most other aquatic life (such as macroinvertebrates, periphyton, and zooplankton) in Lower Slate Lake would be lost during operations as a result of this action. Some individuals might survive, but marginal food sources and the lack of suitable habitat as the lake elevation rises appear to be the major limiting factors."[55] Functional habitat values in the Wet Tailings Storage Facility area include high values for wildlife habitat (located primarily along the lake edge), and moderate values for fish habitat, and low values for carbon/detrital export, with low to moderate values for sediment/shoreline stabilization

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[55] See FSEIS, Section 4.9.3, page 4-38, Integrity of Freshwater Habitat.

and nutrient cycling.[56,16] The inundation of adjacent forested and scrub-shrub wetlands by the rising lake waters would reduce the wildlife habitat values of those wetlands. There will be a conversion of one aquatic habitat type (wetland) for another (open water).

Lower Slate Lake will be used as the settling pond and disposal site for the tailings generated from the mill. The mill will crush, grind, and float the sulfides out of the material. The sulfides contain the gold and will be processed off site. There will be no cyanide or arsenic added to the milling circuit. The tailings have been analyzed for the ability to generate acid drainage, and to develop metals that could become mobile. The tests described in the FSEIS App. C have shown that the tailings will not be a generator of acid or heavy metals. The tests were performed on both the tailings and the tailings decant water. The components of the tailings decant water that were identified as contaminants include aluminum, chromium, pH, and Total Suspended Solids. The tests have concluded that the pH around the discharge pipe will be toxic to the aquatic environment. This will dissipate very rapidly. The TSS will be harmful to the fish in the immediate area of the discharge. The suspended solids will be discharged to the lower depth portion of the lake. The aluminum levels from the tailings decant water will rapidly decrease to natural levels as the pH is neutralized. Aluminum will pose 4 low risk to aquatic life. This is because

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[56] FSEIS, Sections 3.9 (Aquatic Resources: Freshwater), 3.11 (Wildlife), and 4.9.3 (Effects Common to Alternatives B, C, and D), and 4.11 (Wildlife).

the aluminum concentrates in the tailings is less than that in the lake sediment and the decant water levels are similar to existing concentrations in the lake. The chromium would be in a reduced form, and because of sub-aqueous disposal and the low oxygen conditions, would not be oxidized to a more toxic form. There would be a low potential for chromium to be a risk to aquatic life. Impacts to the aquatic community from physical stress are a greater risk than increased chemical concentrations. Aquatic life will die primarily from being covered with tailings and from the TSS.

The lake will recover over time. The tailings will be placed at a depth to prevent remobilization after closure from wave action. The tailings will be under water and out of the energy of wind driven waves. Post closure water concentrations of chromium and aluminum would pose a minimal risk to aquatic life. Capping of the tailings will assist in re-establishing lake bottom habitat. It is expected that the lake eventually will provide at least equivalent productivity as the current conditions of Lower Slate Lake. The reclamation of the lake will result in more emergent wetlands/vegetated shallows with moderate values for fish habitat, nutrient recycling, carbon/detrital export and sediment/toxicant retention, and high values for wildlife habitat. This functioning emergent wetland/vegetated shallows lake complex, including 15 acres of emergent wetland/vegetated shallows as part of a 62 acre lake, is more valuable to the aquatic ecosystem than a permanently filled wetland (DTF) that has lost all aquatic functions and values.

The Federal and State resource agencies have conditioned the respective permits to require habitat and

mortality monitoring activities in the Wet Tailings Storage Facility. Collected information would be used to determine the effects of the discharge of tailings on the lake habitat. The surface of the lake waters should rise, by project closure, to its maximum height above the lake's original surface, and the lake waters would eventually inundate approximately 39 acres of adjacent forested and scrub-shrub wetland habitats[57], converting these to a deepwater habitat. This would constitute a conversion of one type of water of the U.S. to another: converting adjacent forested and/or scrub-shrub wetlands to non-vegetated waters. These non-vegetated waters would convert, by either natural or artificial[58] means (active lake restoration), to emergent wetlands/vegetated shallows (special aquatic sites). The anticipated end result would be a lake of approximately 62 acres in area (47 acres of deepwater habitat and 15 acres of emergent wetlands/vegetated shallows along the fringe). This conversion process would con-

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[57] The applicant intends to clear these land areas mechanically prior to inundation of the lake waters. Otherwise, the vegetation would inhibit movement of the raft carrying the slurry line, and preventing an even deposition of material onto the lake bottom.

[58] The Kensington Gold Project's Mining Plan of Operations contains a Reclamation Appendix, which includes the Lake Restoration Plan. The DA recognizes that this Restoration Plan is a conceptual plan, and that future revisions will be evaluated and approved as appropriate. Capping of the mine tailings in the impoundment is required by ADEC. The final reclamation plan will assure that the latest methods are used to maximize success.

tinue during and after the life of the project. The lake and its emergent fringe wetlands/vegetated shallows would provide potential fish habitat after final lake restoration had been completed and would include food sources, protection from predation, nesting capabilities, etc., whereas the lake's open waters would provide an open space for fish and other motile organisms.[59] The FSEIS concluded that after closure Lower Slate Lake could be restored to at least equivalent aquatic habitat.

For all alternatives, wetlands on which other project components (e.g., connecting roadways, borrow sites, building and material storage fill pads, etc.) will be located, all have high values for wildlife habitat, and carbon/detrital export, with moderate values for sediment and/or nutrient cycling.[60] The temporary discharge of fill into the forested and scrub-shrub wetlands for the construction and operations of these structures would result in reduced wildlife habitat values during the life of the project. However, at project closure (and completion of all required reclamation) there will be moderate to high (when fully recovered) functions for wildlife habitat in these reclaimed areas.

The proposed marine docking facility at Slate Creek Cove has low to moderate fish habitat values. The placement of structures (e.g., piles and floats) and the discharge of fill into the intertidal waters for con-

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[59] FSEIS, Sections 4.9 (Aquatic Resources: Freshwater) and 4.9.3 (Effects Common to Alternatives B, C, and D.

[60] See FSEIS, Sections 3.9 (Aquatic Resources: Freshwater) and 3.11 (Wildlife).

struction of an abutment for a docking facility would result in short term increases in suspended sediments in the water in the areas adjacent to the work activities. However, because the nearshore sediments are primarily coarse materials and cobbles, these materials would settle rapidly to the bottom, thus decreasing the magnitude and duration of the suspended sediment concentrations. In addition, the site is subject to the ebb and flow of the tide, and therefore, this added component of the marine tidal system would ensure that the subtidal and intertidal habitat values of the Cove would not be adversely impacted.[61] Reclamation of the site would result in removing all structures, and excavating the majority of the fill from below the High Tide Line, and flattening the rest to form a rocky subtidal substrate, all in conformance with the reclamation plan.

Least Environmentally Damaging Practicable Alternative Acreage Calculations.[62] (Note: The numbers below do not fully reflect the Reclamation and Closure Plan for the Kensington Gold Project, since the Reclamation Plan is a conceptual plan, and future revisions will be evaluated and approved by the Corps as appropriate.)

Based on information provided in the FSEIS, the application form and other documentation in the Corps' case files, and in the referenced documents (Attachment C), and calculating the acreages of impact[63] to

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61 FSEIS, Section 4.10.3, Effects of Alternatives B, C, and D (Aquatic Resources: Marine).

62 Data taken from the FSEIS.

63 See Least Damaging Acreage Calculations.

waters of the U.S. by project closure, Alternatives B, C, and D have the least permanent impacts (3.44 acres) to the aquatic environment over the anticipated life of the project. This conclusion remains the same when adding the impacts of the 1.3 acres of fill material for the Cascade Point breakwater for Alternatives B and D (not included in the net loss column below).

	ALTERNATIVES						
	A	A1	A2	A3	B	C	D
Initial Impact To Waters of the U.S. (Acres)	268.1	171.2	187	207	97.2	118.4	98.6
NET LOSS (Acres) After Reclamation	164	108.2	124	144	3.44	3.44	3.44

See Section VI, above, for a detailed description of each alternative.

In Alternatives A through A3, the filling of the Dry Tailings Facility area would all result in the permanent conversion of wetlands to uplands. Further as explained in Section VI above and Section VIII below, these alternatives are not practicable. Permanent loss of these wetlands is an adverse environmental impact. In Alternatives B, C, and D, construction of the Wet Tailings Storage Facility would result in the conversion of wetlands to a deepwater habitat (due to the rising water level), the edges or shallow portions of which will eventually become emergent wetlands/vegetated shallows.

These conversions of one type of water of the U.S. to another are not a significant permanent adverse impact to the aquatic environment, and the temporal losses discussed above would not result in significant permanent adverse impacts to the aquatic environment. Our evaluation places special emphasis on the

persistence and permanence of the effects described in this ROD and the FSEIS [see 40 CFR 230.10(c)]. The permanent loss of wetland functions and values in the Alternative A variants is more damaging and outweighs the temporary losses to the lake and its associated functions and values.

See Section XI, Subpart E, below, for a further discussion of the information provided in the acreage calculations. The Corps concludes that Alternative D is the least environmentally damaging practicable alternative because the impacts to the aquatic ecosystem are less harmful than the impacts of the Alternative A variants, which include permanent wetland losses, and it incorporates a water treatment system to ensure water quality is met.

VIII. PROJECT COST CALCULATIONS SUMMARY

We previously determined that the Alternative A variants were practicable alternatives. This was based on an assumption that since Alternative A had been permitted in 1998, it was still practicable to Coeur. We have reexamined that determination and, for the reasons explained below, now determine that neither Alternative A, nor any of its variants, is practicable.

The applicant submitted an "Alternative Material Disposal Sites Cost Analysis"[64] with an expense breakdown for each of the proposed preferred actions, as well as for each of the respective alternatives. This analysis, which included logistics, technology and cost considerations, demonstrated to

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[64] Coeur Letter to the Corps, dated November 23, 2004.

the Corps that the applicant did not consider Alternative A to be a practicable alternative. Also, the Alaska Department of Natural Resources (ADNR) analyzed data provided by the applicant, and concluded[65], "Therefore, we do not consider Alternative A to be a 'practicable' or 'reasonable' alternative from the standpoint of cost or economics." The Corps reviewed and reevaluated the ADNR analysis documentation and other relevant ....

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65 Letter dated December 1, 2004, from the State of Alaska's Department of Natural Resources, Office of Project Management and Permitting, and addressed to David Cox of the USFS.

Commuting Ferry vs. Personnel Camp

A daily commuting ferry as described in Section VI of this ROD eliminates the need for an operational personnel camp. Coeur explained in its October 2004 Practicability Analysis that the annual cost to transport personnel to a camp is $5.296 million, compared to $1.49 million for Berners Bay access. Operating costs for a camp are estimated at more than $3 million annually. Operating a camp also requires substantial on-site fuel transportation and storage. It is our determination that Coeur's economic analysis supports the conclusion that a personnel camp is not practicable for cost reasons.

IX. FINDINGS

1. OTHER REQUIRED AUTHORIZATIONS:

   A. The Alaska Department of Environmental Conservation (ADEC) has issued a Certificate of Reasonable Assurance, dated May 6, 2005, with 15 conditions. Conditions on this Certification are listed on Attachment D of the ROD.

      The Certificate also stated, with reference to the proposed disposal of processed mine tailings into an alpine lake, that "The Tailing Disposal Facility (TDF) proposed to be constructed in Slate Creek will be considered a 'disposal site' under federal law and policy (see 40 CFR § 230.3(i)), and is hereby authorized as a 'treatment work' under State law (see AS 46.03.900(33)). Thus, State of Alaska water quality standards will not have to be met within that area. 18 AAC 70.010(c). Water discharged from the TDF shall

meet NPDES permit limitations, and the receiving water, East Fork Slate Creek, must meet State water quality standards."

B. The Alaska Department of Natural Resources, Office of Project Management and Permitting, Alaska Coastal Management Program, has issued a Final Consistency Response (Concurrence), dated April 25, 2005.

C. The USEPA, Region 10, has issued an Authorization to Discharge under the National Pollutant Discharge Elimination System (NPDES Permit), dated September 1, 2005.

D. See Attachment G for Cascade Point Docking Facility findings.

2. COMMENTS RECEIVED:

A. Coeur prepared several document summaries, each addressing comments received from Federal and State Agencies, to the Corps Public Notice, dated June 21, 2004, and to the Public Hearings, which were held by the USEPA in accordance with the USEPA's National Pollutant Discharge Elimination System (NPDES) regulations. The public hearings were held on July 26, 2004, in Juneau, Alaska, and on July 27, 2004, in Haines, Alaska (see case file).

B. FEDERAL AGENCIES

US ENVIRONMENTAL PROTECTION AGENCY [USEPA).

Comment dated August 20, 2004. Also, see Coeur's Response #18 (Attachment C). USEPA's comment letter, with three attachments, pertained to Goldbelt's proposed marine terminal at Cascade Point[70], and to the proposed changes to the Kensington Mine's Plan of Operations, which includes a marine terminal at Slate Creek Cove and a discharge into Lower Slate Lake. The USEPA's comments respective to Coeur's project centered on the 404(b)(1) Guidelines, and after several pages of instructive discussion relative to 40 CFR 230.10, the USEPA "...rated Alternatives A and A1[71] as 'Lack of Objection' and Alternatives B and C as 'Environmental Objections'." The USEPA concluded the cover letter with a request "...to work collaboratively with you and the State to achieve a satisfactory outcome."

USEPA ISSUE #1. "... the wetlands analysis in the DSEIS is biased due to the lack of accurate and detailed wetlands mapping on the Kensington side of the project area. Therefore, there is in-

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70 See Permit Application POA-1997-245-M

71 Note that Alternative A1 here is the same as Alternative A2 in this ROD.

sufficient information to make a reasonable judgment about the comparative effects of Alternatives A/A1 and Alternatives B/C on wetlands."

CORPS RESPONSE TO USEPA: The wetlands were properly delineated in accordance with the 1987 Manual on both sides of Lion's Heads Mountain and thus there 'is adequate information to analyze the potential impacts upon wetlands. See the discussion in Section VI (Alternatives Considered) of this ROD.

USEPA ISSUE #2. "With regard to the ecological risk of the tailings disposal options, the DTF (Dry Tailing Facility] (Alternatives A/A1) minimizes the exposure pathways by lining the dry stack cells, capping the dewatered tailings, treating DTF runoff in a storm water detention and sediment pond, and discharging a very small volume of treated water into a small creek devoid of fish. In contrast, the Lower Slate Lake tailings impoundment (Alternatives B/C) directly exposes the entire lake to the tailings, which have exhibited considerable toxicity (per the failed amphipod bioassay)."

CORPS RESPONSE TO USEPA: Lower Slate Lake is the least environmentally damaging practicable alternative location for the tailings disposal. The tailings will be capped at the cessation of operation unless information is presented to the contrary. See ADEC condition #15.

Testing of the tailings and water column of the impoundment will be completed quarterly to insure projected water quality modeling is accurate. See ADEC condition #8. In accordance with 33 U.S.C. 1341(d), all 401 conditions are incorporated Into the Department of the Army permit.
See Section XI of this ROD, Subpart B, Evaluation and Testing, and Constraints.

USEPA ISSUE #3. "Humpback whales are listed as an endangered species under the Endangered Species Act, and Steller sea lions are listed as a threatened species (although populations of both species appear to be increasing in Southeast Alaska."

CORPS RESPONSE TO USEPA: See the discussion in Section 1X.2.8. ENDANGERED SPECIES ACT (ESA) CONSULTATION PROCESS, in this ROD.

USEPA ISSUE #4. "The DSEIS also documents the potential impacts that each alternative may have on recreation, including noise, wakes, lights, safety issues, and visual impacts."

CORPS RESPONSE TO USEPA: See the FSEIS, Sections 4.13 (Land Use and Recreation), 4.14 (Visual Resources), 4.15 (Socioeconomics), 4.18 (Noise), and 4.21 (Cumulative Effects) .

USEPA ISSUE #5. "After the federal agencies published the DSEIS, but before EPA approved the draft NPDES permit,

EPA determined that the proposed effluent limits for some of the above pollutants could not be made without additional treatment. The applicant then revised the NPDES permit application to include a reverse osmosis (RO) wastewater treatment system and a pipeline diversion of Upper Slate Lake flows around Lower Slate Lake."

CORPS RESPONSE TO USEPA: Coeur has agreed to construct a Reverse Osmosis, or water treatment facility, to aid in the removal of pollutants from water discharged from Lower Slate Lake, as well as construction of a pipeline diversion (of waters around the impoundment and downstream to the dam spillway). These components are part of Alternative D.

USEPA ISSUE #6. "Due to the demonstrated toxicity of the tailings samples in the bioassay tests, and the limited application of other standard test on contaminant mobility and pathways, EPA believes that the tailings slurry is a carrier of contaminants (as defined in the Guidelines at 40 CFR 230.3)." (per the failed amphipod bioassay).

CORPS RESPONSE TO USEPA: There is no conclusive test data showing that toxic substances in the tailings caused amphipod mortality. The poor survival of the amphipods in the test cell may be attributed to smothering, the nature of how the material was placed, or the floatation agent(s) used in the bulk sample. See

FSEIS App. C and the discussion in Section VII above. Tests upon the tailings have conclusively shown that the tailings will not generate an acid discharge or result in a metals leachate being generated. We agree that all fish and most aquatic life would be lost during operation, (FSEIS 4.9.3). The FSEIS concluded that after closure Lower Slate Lake could be restored to at least equivalent aquatic habitat (see FSEIS 4.9.7). Capping of the impoundment tailings was added as a permit condition by ADEC to isolate any potential contaminants from the water column and to provide habitat for recolonization in the storage facility. The State of Alaska issued a 401 Certificate of Reasonable Assurance for Alternative a ADEC also stated that "the available information suggests that the toxicity risks associated with the tailings will be low during and after mining operations."[72] *Conditions were incorporated by ADEC to ensure that no potential contaminants would leave the disposal site condition #15. ADEC included a requirement for testing of the material on a quarterly basis condition #8. In addition the Corps agrees to add the following condition to the permit #10. The waters and the discharged processed mine tailing sediments, located in Lower Slate Lake, shall be tested, at lake closure or just prior to cessation of discharges of mine wastes into Lower Slate Lake, in accordance*

with appropriate testing requirements (at the ....

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Mitigation also includes funding by Coeur for the monitoring activities in Berners Bay. These activities will be conducted by the NMFS and the Alaska Department of Fish and Game.

Coeur has, in part as mitigation for unavoidable impacts to waters of the U.S., and in part as a result of agreements reached during the Endangered Species consultation process with the USFS and Coeur, agreed to provide funding to the NMFS and to the Alaska Department of Fish and Game, with the intent that these agencies will conduct the following monitoring activities in Berners Bay;

- Hydrocarbon monitoring in water, sediment, and mussel tissue. This would be an annual program with a 6-year commitment of monitoring.
- Annual aerial surveys of herring spawning monitoring in Berners Bay. This is an annual commitment with up to 10 flights per year.
- A trained observer will conduct marine mammal and bird surveys during ferry commutes across Berners Bay during the eulachon run.

The Corps has considered each of the mitigation items listed above and has concluded that all of these taken as a group satisfy the requirement of mitigating for the unavoidable impacts of the project.

XII. Compliance with Environmental Requirements: The issuance of permits for the proposed project is in compliance with applicable environmental requirements. The development of the

DSEIS and the FSEIS was accomplished in accordance with the National Environmental Policy Act of 1969, as amended. Recommendations of the USFWS prepared pursuant to the Fish and Wildlife Coordination Act of 1958, as amended, have been fully considered in the permit decision, Coordination with the NMFS pursuant to Section 7 of the Endangered Species Act of 1973, as amended, has been completed. The recommendations of the USEPA have been fully considered. An evaluation of the discharge of fill material and dredged fill material as required by Section 404(b)(1) of the Clean Water Act, 40 CFR 230, was completed and is attached to this document[137]. The discharge complies with the guidelines, with the inclusion of the' appropriate and practicable conditions listed in Attachment D to minimize pollution and the adverse effects to the affected ecosystem. I find that issuance of permits as described above is in conformance with these guidelines. The Alaska Department of Natural Resources has issued a Coastal Zone Management Consistency Determination, and ADEC has issued a Certificate of Reasonable Assurance, with conditions. Both of these documents will be incorporated into and become part of the Corps permits.

XIII. Section 176(c) of the Clean Air Act General Conformity Rule Review. The proposed project has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been shown that the activities proposed under this permit will not exceed *de minimis* levels of direct emissions of a

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[137] See Attachment B and G.

criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. This no effect determination has been coordinated with the U.S. Environmental Protection Agency and the Alaska Department of Environmental Conservation. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for this individual permit.

XIV. Determination. I find that the issuance of the Corps permits, as described by regulations published in 33 CFR Parts 320 through 330, with the scope of work as described in this document is based on a thorough analysis and evaluation of all issues set forth in this ROD. There are no less environmentally damaging, practicable alternatives available to the applicants that will achieve the purposes for which the work is being proposed; the proposed work is deemed to comply with established Federal, State and local laws, regulations, and codes; the issuance of these permits is consistent with National Policy, statutes, and administrative directives; and on balance, issuance of Corps permits to Coeur and Goldbelt for the proposed work is not contrary to the public interest. As explained in Subpart H, above, all practicable means to avoid and/or minimize environmental harm from the selected, permitted alternatives have been adopted and required by terms and conditions of these permits.

29 Mar 2006
Date

/s/Timothy J. Gallagher
Timothy J. Gallagher
Colonel, Corps of Engineers
District Engineer

APPENDIX R

Department of Army, Corps of Engineers
Alaska District

Section 404(b)(1) Guidelines Evaluation

KENSINGTON GOLD PROJECT
POA-1990-592-M

This document, which will be attached to and become part of the Corps Record of Decision (ROD), constitutes a Section 404(b)(1) Guidelines (Guidelines) Evaluation of Coeur Alaska's (Coeur) proposed Kensington Gold Project as described in Coeur's final Department of the Army (DA) permit application. This evaluation addresses the potential environmental effects from the discharges of dredged or fill material to waters of the United States (U.S.), including wetlands, associated with the project. These effects are described in the U.S. Forest Service (USFS) Final Supplemental Environmental Impact Statement (FSEIS) for the Kensington Gold Project. A site-specific evaluation is presented here for the project in sufficient detail for final decision-making

and compliance with the Guidelines requirements. Information presented here will be summarized in the ROD. Attachment C to the ROD lists references drawn upon for this evaluation.

Coeur proposes to discharge an approximate total of 3,487,950 cubic yards (cy) of fill material into an approximate total of 98.6 acres of waters of the U.S., including forested and scrub shrub wetlands, in conjunction with the construction of new mine facilities and associated infrastructure. The applicant's stated purpose for the project would be the "relocation of the major mine components from the Kensington Mine site at Comet Beach on Lynn Canal, to the Jualin Mine site (approximately two miles to the southeast), at Slate Cove, on the west side of Berners Bay, in order to access the ore body from the Jualin side of the peninsula." The project is discussed in the FSEIS, and includes several inter-related project components. The overall mine operation project would need the following components: (1) building pads for milling facilities, administrative and support facilities; (2) tailings disposal facilities; (3) fill pads associated with pipelines; (4) a waste rock disposal site; (5) access roads and bridge abutments; (6) staging and laydown areas; (7) an infiltration gallery; (8) material and topsoil stockpiles; (9) a marine dock facility; and (10) berms to encircle settling and storage ponds.

The applicant's preferred alternative, Alternative D, as described in the FSEIS, will be addressed in this Guidelines evaluation. The proposed work description includes activities which are not subject to Section 404 of the Clean Water Act (Section 404), and they are not part of this evaluation. This includes the placement of structures (floats, docks and

piles), in navigable waters of the U.S. for the construction of a marine terminal in Slate Creek Cove, which are subject to Section 10 of the Rivers and Harbors Act of 1899. The activities subject to Section 404 are the discharges of dredged or fill material into waters of the U.S.

Coeur submitted a practicability analysis along with a cost analysis breakdown for their proposed actions (Lower Slate Lake disposal site, the Slate Creek Cove marine terminal, and infrastructure (roads, building pads, etc.) associated with the mining operation), to include an analysis for each of the primary alternatives considered.[1] An evaluation of these documents as well as other information sources indicates that, though the previously permitted site (Alternative A in the FSEIS) was once determined to be practicable, it is not currently practicable to the applicant due to cost and logistics. By contrast, the applicant's preferred alternative (Alternative D) is the least environmentally damaging practicable alternative.[2]

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[1] See discussion in the Corps ROD.

[2] Alternative Material Disposal Sites Cost Analysis.

PROJECT COMPONENT:
MATERIAL DISPOSAL
(LOWER SLATE LAKE)

I. Evaluation of Compliance with 404(b)(1) Guidelines [restrictions on discharge, 40 CFR § 230.10(a)-(d)]

a. Alternatives Test. Refer to information discussed in the DSEIS, plus the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.

	Yes	No
(1) Is there a practicable alternative to the proposed discharge, which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences? (For this requirement practicable alternatives may include activities which do not involve discharges to waters of the U.S. or discharges at other locations in waters of the U.S.) *The applicant submitted a Practicability Analysis and a Cost Analysis breakdown for the proposed action, Alternative A along with its respective alternative (described in file number POA-1990-592-2), also referred to as Alternative A. The Alaska Department of Natural Resources (ADNR) analyzed the practicability of the applicant's preferred alternative versus*	*4 ☐	☒

Alternative A, and determined[3] *that alternative A was neither practicable nor reasonable from the standpoint of cost or economics. The Corps reviewed these documents and other relevant information and independently determined that the previously authorized site was not practicable to the applicant due to cost and logistics, and that based on the similarities (location, logistics of material transport, construction and operation of the facility, etc.) of the alternative variants of Alternative A (Alternatives A1 through A3), these three variations were also not practicable. In addition, the Corps also determined Alternative A and its three variants were not less environmentally damaging as they would result in the permanent loss of 34 to 113 acres of wetlands, which are a special aquatic site and are afforded greater protection under the Section 404(b)(1) Guidelines. Alternative D would result in the permanent loss of 3.44 acres of wetlands due to dam construction, the temporal loss of 20 acres of deep water habitat (Lower Slate Lake), and the conversion of 39 acres of wetland to deepwater habitat (lake). After project closure and reclamation, the lake would measure 62 acres and would be restored to*

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[3] ADNR Letter, dated December 1, 2004, addressed to the USFS.

the equivalent habitat value that existed prior to the project. This would include 47 acres of deepwater habitat and 15 acres of emergent wetlands/vegetated shallows.

(ii) If the project is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no practicable alternative sites available? *Not applicable. Fill material would be discharged to construct a dam in 3.44 acres of wetlands adjacent to the creek outlet of Lower Slate Lake. However, dams are a water dependent activity as they must be located in the outlet creek and its adjacent wetlands in order to fulfill their basic purpose of impounding water, The currently permitted material disposal site,[5] otherwise referred to as Alternative A, or the No Action Alternative, is a Palustrine Forested & Scrub-shrub Wetland, whereas the applicant's preferred alternative, Lower Slate Lake, is a deep-water habitat (20 acres) with a narrow and irregular emergent wetland fringe. The mine tailings would be disposed of in the deepwater habitat (Lower Slate Lake), which is not a special aquatic*

	*
☐	☐
NA	NA

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[4] An * is marked above the answer that would indicate noncompliance with the Guidelines.

[5] *DEIS, Sections 3.12.3, and 4.12. Also, see* POA-1990-592-M.

site under the Guidelines. See the ROD for a discussion of project costs,[6] *as well as ADNR 's letter addressed to the USFS, dated December 1, 2005. See the FSEIS, Section 2, for a discussion of alternatives. Documentation in the FSEIS examined alternative material disposal locations*[7] *and determined that the lake site was the only acceptable one for their purposes. The Corps examined the proposed site as well as the permitted site, and all available information and determined that the lake site is the least environmentally damaging practicable alternative.*

b. Special restriction. Will the discharge:
Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.

	*	
(i) Violate State water quality standards?[8] Not applicable. *DSEIS: Section 4.6, Appendix A: Surface Water Quality. FSEIS: Section 4.6.7 See Section 401 Water Quality Certification, issued by the Alaska Department of Environmental Conservation, dated May 6, 2005.*	☐	☒

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[6] ROD, Section VII. Project cost Calculations Summary.

[7] USFS FSEIS, Section 2.4 Project Alternative and Components Considered but not Studied in Detail.

[8] ADEC letter to the Corps, dated December 6, 2004.

(ii) Violate toxic effluent standards (under Section 307 of the Act)? *DSEIS: Section 4.6, Appendix A: Surface Water Quality. FSEIS: Appendix A: Water Quality Analysis.*	* ☐	☒
(iii) Jeopardize endangered or threatened species or their critical habitat? *DSEIS: Sections 4.10 and 4,11. FSEIS: Sections 4.10,3, and 4.11.2. Also, refer to attached Rod, discussion of comments received, with specificity to ESA consultation.*	* ☐	☒
(iv) Violate standards set by the Department of Commerce to protect marine sanctuaries? *Not Applicable (NA). There are no marine sanctuaries on or near the project site.*	* ☐ NA	☐ NA

c. Other restrictions. Will the discharge contribute to significant degradation of "waters of the United States" through adverse impacts to: *Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references. Also, see the FSEIS: Appendix A, Water Quality Analysis.*

	Yes	No
(i) Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and special aquatic sites? *See DSEIS: Sections 4.8, Groundwater Quality; 4.6, Surface Water Quality; and 4.12, Soils, Vegetation, and Wetlands. FSEIS: Section 4.7.3, Groundwater Quality; 4.5.6, Surface Water Quality; 4.12.3, Wetlands.*	* ☐	☒

(ii) Life stages of aquatic life and other wildlife? *DSEIS: Sections 4.11, Wildlife; and 4.12, Soils, Vegetation, and Wetlands. Also, refer to Section XI of the ROD.*	* ☐	☒
(iii) Diversity, productivity and stability of the aquatic life and other wildlife or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy? *DSEIS: Sections 4.6; 4.9; 4.11; and 4.12. FSEIS:4.9.6., 4.11.2., and 4.12.3.*	* ☐	☒
(iv) Recreational, aesthetic and economic values? *DSEIS: Sections 3.13 through 3.15; and 4.13 through 4.15. FSEIS: 4.13.3., 4.14.3., 4.15.3.*	* ☐	☒
d. Actions to minimize potential adverse impacts (mitigation). Will all appropriate and practicable steps (40 CFR § 230.70-77, Subpart H) be taken to minimize the potential adverse impacts of the discharge on the aquatic ecosystem? [Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.] *DEIS: Section 2.5. FSEIS: Section 2.5.1: Mitigation. For follow-up, refer to ROD, Section VII, Subpart G.*	☒	* ☐

II. Factual Determinations (40 CFR § 230.11)

The determinations of potential short-term or long-term effects of the proposed discharges of dredged or

fill material on the physical, chemical and biological components of the aquatic environment included items a – h, below, in making a findings of compliance or non-compliance.

Subpart C: Potential Impacts on Physical & Chemical Characteristics of the Aquatic Ecosystem;
Subpart D: Potential Impacts on Biological Characteristics of the Aquatic Ecosystem;
Subpart E: Potential Impacts on Special Aquatic Sites; and
Subpart F: Potential Impacts on Human Use Characteristics.
Subpart G: Evaluation and Testing

There is potential for short-term or long-term adverse effects (in light of Subparts C-G, listed above) of the proposed discharge as related to:

	Yes	No
a. Physical substrate determinations *[FSEIS: Section 4.12.1; Appendix C].* *The project site is a deep water lake with an irregular emergent wetland fringe. The lake bottom soils are primarily sandy silt, underlying organic mats. During the life of the project, the lake substrate would be covered by processed mine wastes, consisting of grains that are sand sized to very fine material. No dredging or other impacts to the substrate would occur. However, the substrate under the proposed dam is primarily emergent wetland, all of which would be mechanically land cleared rior to the deposition of fill to construct the dam.*	☒	☐

b. Water circulation, fluctuation and salinity determinations
[FSEIS: Section 3.6 through 3.10] ☒ ☐
The lake is fairly shallow, approximately 51 feet deep, with little stratification. There are no water currents, other than wind driven. The proposed dam would permanently block flow out of the lake and there would be little fluctuation in water level. Salinity is not applicable to this freshwater lake.

c. Suspended particulate/turbidity determinations *[FSEIS, Appendix C - Ecological Risk Assessment of Aqueous Tailings Disposal at the Kensington Goldmine]* ☒ ☐
The introduction of mine tailings into the lake would result in an increase of total suspended solids (TSS)). The TSS would be discharged at the deepest portion of the lake via a slurry pipeline and silt curtains would be required to minimize the size of the silt plume. A nontoxic chemical flocculent would be added to the slurry to enhance the deposition of suspended particles in the Lower Slate Lake disposal site. These effects would persist as long as the tailings discharge occurred. Upon project closure the tailings would be capped and suspended particulate/turbidity levels would be equal to pre-project conditions.

d. Contaminant determinations
[FSEIS, Appendix C - Ecological Risk Assessment of Aqueous Tailings Disposal at the Kensington Goldmine] ☒ ☐
Testing was performed on the tailings material to be placed in Lower Slate Lake. The principal contaminants of concern would be aluminum, chromium, pH, and Total Suspended Solids. There are anticipated to be short term effects. Over the short and long term acceptable constraints are available and would be implemented to ensure contaminants are reduced to acceptable levels within the disposal site and would not be transported beyond the limits of the disposal site.

e. Aquatic ecosystem structure and function determinations
[FSEIS: Section 4.9 and 4.12] ☒ ☐
The USFS and the Corps determined that with the introduction of processed mine waste, all of the macroscopic and most if not all of the microscopic life in the lake would die. This would be a temporal effect as after project closure the lake's aquatic ecosystem structure and functions would be restored and expanded.

f. Proposed disposal site determination (disposal sites and/or size of mixing zone are acceptable) ☐ ☒
[FSEIS: Section 2, Description of proposed actions and other Alternatives].

g. Determination of cumulative effects on the aquatic ecosystem
[FSEIS: Sections 4.12 and 4.21] ☒ ☐
After project closure there would an approximate increase in size of the lake by greater than 260% to approximately 62 acres with a water depth of about 30 feet. This would be a beneficial impact.

h. Determination of secondary effects on the aquatic ecosystem
[FSEIS: Section 4] ☒ ☐
Secondary effects of the dam and tailings discharge would include an increase in the size of Lower Slate Lake and the surface water elevation of Lower Slate Lake. In addition, there would be noise and air quality impacts from the operation of heavy equipment used to construct the dam.

III. Technical Evaluation Factors 40 CFR § 230 Subparts C-F

a. Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem (Subpart C)

FSEIS-Section 4.0 Environmental Impacts

	Ssignificant	Not significant
1. Substrate *[FSEIS: Sections 4.3 and 4.4, Appendix C]*	☐	☒
2. Suspended particulates/turbidity *[FSEIS, Appendix C - Ecological risk Assessment of Aqueous Tailings Disposal at the Kensington Goldmine]*	☐	☒
3. Water *[FSEIS: Section 4.5 through 4.10]*	☐	☒
4. Alteration of current patterns and water circulation *[FSEIS: Section 4.5]*	☐	☒
5. Alteration of Normal Water fluctuations/hydro period *[FSEIS: Sections 4.5 and 4.7]*	☐	☒
6. Alteration of salinity gradients *[FSEIS: Sections 4.3]*	☐	☒

b. Potential Impacts on the Biological Characteristics of the Aquatic Ecosystem (Subpart D)

1. Threatened and Endangered species (§ 230.30) [*See ROD, Endangered Species Act, Consultation Process*]. *NA. There are no threatened or endangered species or their critical habitat within this portion of the project area.*	☐	☐
2. Aquatic Food Web (§ 230.31) *[FSEIS: Sections 4.9 & 4.10]* *The discharge of the mine tailings would result in elimination the lake's food web during operation. However, this function would be restored upon closure of the disposal facility.*	☐	☒
3. Other wildlife *[FSEIS: Section 4.11]*. *Modification of the lake would result in impacts to wildlife, such as waterfowl, deer, bear and various small mammals.*	☐	☒

c. Potential Impacts on Special Aquatic Sites (Subpart E)

1. Wetlands *[FSEIS: Sections 4.9 & 4.12]*. *The project site (Lower Slate Lake)is primarily a deep water habitat with a narrow emergent wetland fringe. Con-*	☐	☒

struction of the dam to create the impoundment would result in the permanent loss of 3.44 acres of wetlands. The expansion of the lake would involve inundating approximately 39 acres of adjacent forested and scrub-shrub wetlands, converting them to deep water habitat.

2. Sanctuaries and refuges ☐ ☐
[FSEIS: Section 4.11]
NA. There are no sanctuaries or refuges in the project area.

3. Mud Flats – NA. ☐ ☐
There are no mud flats in the project area.

4. Vegetated Shallows – ☐ ☒
There are vegetated shallows in Lower Slate Lake. These would be inundated and converted to deepwater habitat. After project closure the lake would be restored to a mixture of deepwater habitat and emergent wetland/vegetated shallows along the lake margins.

5. Coral reefs – NA. ☐ ☐
There are no coral reefs in the project area.

6. Riffle and pool complexes – *NA.* ☐ ☐
There would not be any discharges to riffle/pool complexes.

d. Potential Effects on Human Use Characteristics (Subpart F)

Description of Social Environment [Base condition]: See FSEIS, Sections 4.0 Environmental Impacts, and 3.15 Socioeconomics.

1. Effects on municipal and private water supplies - *NA.* ☐ ☐
The project would not impact either municipal and private water supplies.

2. Recreational and Commercial fishing impacts (including subsistence fishing) *FSEIS: Sections 4.15 & 4.20.* ☐ ☐
NA. Lower Slate Lake is not subject to fishing pressure, whether subsistence, recreational or commercial.

3. Effects on water-related recreation *[FSEIS: Section 4.13]* ☐ ☐
NA. Lower Slate Lake is isolated from roads and has not been recorded as having any recreational values. The proposed discharge would not impact water related recreation.

4. Aesthetics *[FSEIS: Section 4.14]* ☐ ☒
The discharge of fill would adversely impact the site's aesthetic values, however upon project closure the site's aesthetic values would be restored.

4. Effects on parks, National and historic monuments, National seashores, wilderness areas, research sites, and similar preserves. ☐ ☐
NA. the project site is not located in one of these areas.

IV. Evaluation of Dredged or Fill Material (Subpart G, 40 CFR § 230.60)

a. The following information has been considered in evaluating the biological availability of possible contaminants in dredged or fill material: (checked boxes apply). *[FSEIS Appendix C - Ecological Risk Assessment of Aqueous Tailings Disposal at the Kensington Goldmine]*

1. ☒ Physical characteristics (receiving waters, bottom sediments, slurry constituents).
2. ☒ Hydrography in relation to known or anticipated sources of contaminants
3. ☒ Results from previous testing of the material or similar material in the vicinity of the project
4. ☐ Known, significant, sources of persistent pesticides from land runoff or percolation

5. ☐ Spill records for petroleum products or designated (§ 311 of CWA) hazardous substances
6. ☒ Other public records of significant introduction of contaminants from industry, municipalities or other sources
7. ☒ Known existence of substantial material deposits of substances which could be released in harmful quantities to the aquatic environment by man-induced discharge activities

b. An evaluation of the information above indicates that there is reason to believe the proposed dredged or fill material is not a carrier of contaminants, or that levels of contaminants are substantively similar at extraction and disposal sites. The material meets the testing exclusion criteria.[9] *The tailings material was tested and will contain contaminants. See factual determinations, above.* ☐ Yes ☒ No ☐ Unknown

c. Is the discharge site adjacent to the extraction site and subject to the same sources of contaminants, or are the materials at the two sites substantially similar? ☐ Yes ☒ No ☐ Unknown

d. If there is a high probability that the material proposed for discharge is a carrier of contaminants, or are there constraints available that are acceptable to the permitting authority and the Regional Administrator to reduce potential contamination to acceptable levels within the disposal site? ☒ Yes ☐ No

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[9] ADEC letter to the Corps, dated December 6, 2004.

As noted above the material has been tested and would contain contaminants. Constraints are available and will be implemented to ensure potential contamination is reduced to acceptable levels and that contaminants will not be transported beyond the disposal site. See ROD Section XI, Subpart G for a complete description of these constraints.

V. Disposal Site Determination 40 CFR § 230.11(f)

a. The following factors, as appropriate, have been considered in evaluating the disposal site.

1. Depth of water at the disposal site	☒
2. Current velocity, direction, and variability at disposal site	☐
3. Degree of turbulence	☐
4. Water column stratification	☐
5. Discharge vessel speed and direction	☐
6. Rate of discharge	☒
7. Dredged material characteristics	☐
8. Other factors affecting rates and patterns of mixing	☒

b. An evaluation of the appropriate factors in V.a. above indicates that the disposal site and/or size of mixing zone is acceptable. ☒ Yes ☐ No

VI. Actions to Minimize Adverse Effects (Subpart H, 40 CFR § 230.70)

All appropriate and practicable steps would be taken, through application of recommentations of § 230.70 - 230.77, to ensure minimal adverse effects of the proposed discharge. ☒ Yes ☐ No

Actions taken: Inclusion of Best Management Practices in the Mining Plan of Operations (POO), DA Permit Special Conditions to include incorporation of the Mining P00, inclusive of reclamation appendix. See Attachment D to the ROD, for a list of Special Conditions to be appended to the Corps (DA) permit. State and local permits have been conditioned to reduce impacts resulting from the material discharge into Lower Slate Lake, as well as into adjacent waters of the United States, including wetlands.

VII. Findings of Compliance or Non-compliance (40 CFR § 230.12)

a. ☐ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for discharge of dredged or fill material complies with the Section 404(b)(1) guidelines

b. ☒ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for the discharge of dredged or fill material complies with the Section 404(b)(1) Guidelines with the inclusion of the appropriate and practicable discharge conditions to minimize pollution or adverse effects to the affected aquatic ecosystem. See Attachment D for a complete list of Special Conditions to be attached to the permit.

c. ☐ The proposed disposal site for discharge of dredged or fill material does not comply with the Section 404(b)(1) guidelines for the following reasons:

1. There is a less damaging practicable alternative ☐
2. The proposed discharge will result in significant degradation of the aquatic ecosystem ☐
3. The proposed discharge does not include all practicable and appropriate measures to minimize potential harm to the aquatic ecosystem ☐
4. There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines. ☐

PROJECT COMPONENT:
MARINE TERMINAL
(SLATE CREEK COVE)

I. Evaluation of Compliance with 404(b)(1) Guidelines [restrictions on discharge, 40 CFR § 230.10(a)(d)]

a. Alternatives Test. Based on information discussed in the FSEIS,

Preliminary:	Yes	No
(i) Is there a practicable alternative to the proposed discharge, which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences? (For this requirement practicable alternatives may include activities which do not involve discharges to waters of the U.S. or discharges at other locations in waters of the U.S.) *The applicant submitted a Practicability Analysis and a Cost Analysis breakdown*[10] *for the proposed action, and its respective alternative (described in file number POA-1990-592-2). The Alaska Department of Natural Resources (ADNR) analyzed the practicability of the appli-*	* ☐	☒

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[10] Alternative Material Disposal Sites Cost Analysis, submitted November 19, 2004, and corrected on November 23, 2004.

cant's preferred alternative versus Alternative A, and determined [11] *that alternative A was neither practicable nor reasonable from the standpoint of cost or economics. The Corps reviewed these documents and other relevant information and Independently determined that although both alternatives were feasible, the alternative site (Comet Beach) described as the permitted action,* [12] *and as the No Action Alternative in the FSEIS, was not practicable due to cost, and logistics, and would not be less environmentally damaging. We have determined Slate Creek Cove to be the least environmentally damaging practicable alternative*

		*
(ii) If the project is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no less environmentally damaging practicable alternative sites available? *The proposed discharges at Slate Creek Cove for the marine terminal include a discharge to approximately 1 acre of wetlands(a special aquatic site) for a staging/storage area located above the high tide line. Staging/storage are not water dependent activities as they do not*	☒	☐

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[11] ADNR Letter, dated December 1, 2004, addressed to the USFS.

[12] Corps permit, POA-1990-592-2, Issued May 6, 1998.

require access or proximity to or siting in special aquatic sites in order to fulfill their basic purpose. As noted in (i) above the applicant submitted a Practicability Analysis and a Cost Analysis breakdown[13] for the proposed action, and its respective alternative (POA-1990-592-2). The Corps has reviewed all available information and determined the applicant has clearly demonstrated there are no less environmentally damaging practicable alternative sites available

b. **Special restriction. Will the discharge:** *Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references. Note that the applicant's evaluation is for reference only, and has not been incorporated by reference anywhere in this document or in the ROD.*

(i) violate State water quality standards? *See FSEIS, Appendix A: Water Quality Analysis. Also, see Section 401 Water Quality Certification, issued by the Alaska Department of Environmental Conservation, dated May 6, 2005.*	* ☐	☒
(ii) violate toxic effluent standards (under Section 307 of the Act)? *See FSEIS,*	* ☐	☒

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[13] Alternative Material Disposal Sites Cost Analysis, submitted November 19, 2004, and corrected on November 23, 2004.

Section4.10.3, Aquatic Resources: Marine.

(iii) jeopardize endangered or threatened species or their critical habitat? *See ROD, under Consideration of Comments, Endangered Species Act Consultation Process.*	* ☐	☒

c. Other restrictions. Will the discharge contribute to significant degradation of "waters of the United States" through adverse impacts to: *See FSEIS, Section 4.0 Environmental Impacts, and Appendix A, Water Quality Analysis. Also, see applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.*

	Yes	No
(i) Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and special aquatic sites? *See FSEIS: Section 4.10 and 4.11.*	* ☐	☒
(ii) life stages of aquatic life and other wildlife? *FSEIS, Section 4.11.*	* ☐	☒
(iii) diversity, productivity and stability of the aquatic life and other wildlife or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy? *See FSEIS, Section 4.0 Environmental Consequences.*	* ☐	☒
(iv) recreational, aesthetic and economic values? *See FSEIS, Sections 4.14 and 4.15.*	* ☐	☒

d. Actions to minimize potential adverse impacts (mitigation). Will all appropriate and practicable steps (40 CFR § 230.70-77, Subpart H) be taken to minimize the potential adverse impacts of the discharge on the aquatic ecosystem? *See Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004. See FSEIS, Section 2.5.2..*	☒	☐ *

II. Factual Determinations (40 CFR § 230.11)

The determinations of potential short-term or long-term effects of the proposed discharges of dredged or fill material on the physical, chemical and biological components of the aquatic environment included items a – h, below, in making a findings of compliance or non-compliance.

Subpart C: Potential Impacts on Physical & Chemical Characteristics of the Aquatic Ecosystem;
Subpart D: Potential Impacts on Biological Characteristics of the Aquatic Ecosystem;
Subpart E: Potential Impacts on Special Aquatic Sites; and
Subpart F: Potential Impacts on Human Use Characteristics.
Subpart G: Evaluation and Testing

There is potential for short-term or long-term adverse effects (in light of Subparts C-G, listed above) of the proposed discharge as related to:

Yes No

a. Physical substrate determinations *[See FSEIS, Sections 3.3, and 3.12, and the Final Mining Plan of Operations, inclusive of Appendix 1].* ☒ ☐

The proposal is to discharge fill material into intertidal waters as well as into wetlands located above the High Tide Line (HTL), all in conjunction with the construction of a marine terminal in Slate Creek Cove. Final reclamation require reclamation of the intertidal fill and restoration of the staging/storage area to wetland. The temporary fill discharge into the intertidal waters, would allow for natural recolonization by benthic flora and faunal species.

b. Water circulation, fluctuation and salinity determinations *[See FSEIS, Sections 2.3.18, and 3.10, and 3.3 and 4.10.]* ☒ ☐

There would be a short term, localized effect due to the fill below the high tide line. But the placement of fill would not alter the tidal pattern. The wetlands at the staging/storage area are not inundated by surface water and there would be little effect.

c. Suspended particulate/turbidity determinations *[See FSEIS, Sections 3.10, and 4.10]* ☒ ☐

The discharge of fill into the intertidal waters would occur at low tide. There is expected to be minimal turbidity. Any suspended sediment

would be flushed out of the cove by the tidal action.

d. Contaminant determinations ☐ ☒
Only clean fill material would be discharged and it would not be a carrier of contaminants.

e. Aquatic ecosystem structure and function determinations *[See FSEIS, Section 4.10.]* ☒ ☐
The discharge of fill material into waters and U.S. in Slate Creek Cove would result in the minor and temporary disruption of the cove's inhabitant, and would be restored after project closure. The discharge into wetlands for the staging/storage area would result in a temporal loss, the area would be restored after project closure.

f. Proposed disposal site determination (disposal sites and/or size of mixing zone are acceptable) ☒ ☐
The project site is subject to tidal waters and the twice daily flushing of the cove waters. Due to the water depths of the cove as well as tidal actions, the size of the mixing zone is acceptable.

g. Determination of cumulative effects on the aquatic ecosystem
[See FSEIS, Sections 4.21] ☒ ☐
The cumulative direct impacts to Slate Creek Cove by the discharge of intertidal fill would be

minimal. The cumulative effects of the discharge to wetlands for the staging/storage area would also be minimal. Both areas would be restored upon project closure.

h. Determination of secondary effects on the aquatic ecosystem
[See FSEIS, Section 4; and Table 4-38, pages 4-152 through 154] ☒ ☐
Secondary impacts would be those associated with operation of the facility. They would include noise and air quality due to heavy equipment operation, as well as human disturbance. These impacts would be minimal and would cease upon project closure.

III. Technical Evaluation Factors 40 CFR § 230 Subparts C-F

a. Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem (Subpart C) FSEIS: Section 4.0 Environmental Impacts.	Ssignificant	Not significant
1. Substrate [FSEIS: Sections 4.3 and 4.4]	☐	☒
2. Suspended particulates/turbidity [FSEIS: Sections 4.5 and 4.9]	☐	☒
3. Water [FSEIS: Section 4.5 through 4.10]	☐	☒
4. Alteration of current patterns and water circulation [FSEIS: Section 4.5]	☐	☒
5. Alteration of Normal Water fluctuations/hydro period [FSEIS: Sections 4.5 and 4.7]	☐	☒
6. Alteration of salinity gradients [FSEIS: Sections 4.3]	☐	☒

b. Potential Impacts on the Biological Characteristics of the Aquatic Ecosystem (Subpart D) *See FSEIS, Section 4.0*

1. Threatened and Endangered species (§ 230.30) [*See ROD, Endangered Species Act, Consultation Process*].	☐	☒
2. Aquatic Food Web (§ 230.31) *[FSEIS: Section 4.10]*	☐	☒
3. Other wildlife *[FSEIS: Section 4.11]*.	☐	☒

c. Potential Impacts on Special Aquatic Sites (Subpart E) — The intertidal area is not a special aquatic site. The staging/storage area would involve the discharge of fill into wetlands.

1. Wetlands: *[FSEIS, Section 4.12]. Approximately 1 acre of wetlands would be filled. They would be restored upon project closure*	☐	☒
2. Sanctuaries and refuges: *NA. There are no sanctuaries or refuges in the project area.*	☐	☐

3. Mud Flats: *NA. There are no mud flats in the project area.*	☐ ☐
4. Vegetated Shallows: *NA. There are no vegetated shallows in the project area.*	☐ ☐
5. Coral reefs: *NA. There are no coral reefs in the project area.*	☐ ☐
6. Riffle and pool complexes – *NA. There are no riffle and pool complexes in the project area.*	☐ ☐

d. Potential Effects on Human Use Characteristics (Subpart F) *Description of Social Environment* [Base condition]: Refer to *See Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004. Also, FSEIS, Section 4.15.*

1. Effects on municipal and private water supplies: *NA. The project would not impact either municipal or private water supplies.*	☐ ☐
2. Recreational and Commercial fishing impacts (including subsistence fishing): *NA. The site has not been recorded as being used for recreational, commerial and/or subsistence fishing.*	☐ ☐

3. Effects on water-related recreation: *[FSEIS: Section 4.13]* *NA. The site has not been recorded as being used for water related recreational purpose.*	☐	☐

4. Aesthetics *[FSEIS: Section 4.14]* *Aesthetic values are dependent upon the subjective interpretation of the observer, and therefore positive, negative, or no effect impacts would be expected. The work would conform to the existing aesthetic settings which include, historical use by the Jualin Mine Company.*	☐	☒

4. Effects on parks, national and historic monuments, national seashores, wilderness areas, research sites, and similar preserves. *See FSEIS, Section 4.13. NA. The site is not located in one of these areas.*	☐	☐

IV. Evaluation of Dredged or Fill Material (Subpart G, 40 CFR § 230.60)

a. The following information has been considered in evaluating the biological availability of possible contaminants in dredged or fill material: (checked boxes apply).

1. ☒ Physical characteristics

2. ☒ Hydrography in relation to known or anticipated sources of contaminants
3. ☒ Results from previous testing of the material or similar material in the vicinity of the project
4. ☐ Known, significant, sources of persistent pesticides from land runoff or percolation
5. ☐ Spill records for petroleum products or designated (§ 311 of CWA) hazardous substances
6. ☒ Other public records of significant introduction of contaminants from industry, municipalities or other sources
7. ☒ Known existence of substantial material deposits of substances which could be released in harmful quantities to the aquatic environment by man-induced discharge activities

b. An evaluation of the information above indicates that there is reason to believe the proposed dredged or fill material is not a carrier of contaminants, or that levels of contaminants are substantively similar at extraction and disposal sites. The material meets the testing exclusion criteria. ☒ Yes ☐ No
Only clean fill material would be discharged.

c. Is the discharge site adjacent to the extraction site and subject to the same sources of contaminants, or are the materials at the two sites substantially similar? ☐ Yes ☒ No

d. If there is a high probability that the material proposed for discharge is a carrier of contaminants, or are there constraints available that are acceptable to the permitting authority and the Regional Administrator to reduce potential con-

tamination to acceptable levels within the disposal site? ☐ Yes ☐ No

Not applicable. The material would be clean material and there is no reason to believe it would be a carrier of contaminants.

V. Disposal Site Determination 40 CFR § 230.11(f)

a. The following factors, as appropriate, have been considered in evaluating the disposal site.

1. Depth of water at the disposal site ☒
2. Current velocity, direction, and variability at disposal site ☒
3. Degree of turbulence ☒
4. Water column stratification ☒
5. Discharge vessel speed and direction *NA.* ☐
6. Rate of discharge ☒
7. Dredged material characteristics ☒
8. Other factors affecting rates and patterns of mixing ☒

b. An evaluation of the appropriate factors in V.a. above indicates that the disposal site and/or size of mixing zone is acceptable. ☒ Yes ☐ No

VI. Actions to Minimize Adverse Effects (Subpart H, 40 CFR § 230.70)

All appropriate and practicable steps would be taken, through application of recommentations of § 230.70 - 230.77, to ensure minimal adverse effects of the proposed discharge. ☒ Yes ☐ No

Actions taken:

VII. Findings of Compliance or Non-compliance (40 CFR § 230.12)

a. ☐ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for discharge of dredged or fill material complies with the Section 404(b)(1) guidelines

b. ☒ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for the discharge of dredged or fill material complies with the Section 404(b)(1) Guidelines with the inclusion of the appropriate and practicable discharge conditions to minimize pollution or adverse effects to the affected aquatic ecosystem. *See Attachment D for a complete list of conditions.*

c. ☐ The proposed disposal site for discharge of dredged or fill material does not comply with the Section 404(b)(1) guidelines for the following reasons:

1. There is a less damaging practicable alternative ..... ☐
2. The proposed discharge will result in significant degradation of the aquatic ecosystem..... ☐
3. The proposed discharge does not include all practicable and appropriate measures to minimize potential harm to the aquatic ecosystem ..... ☐
4. There does not exist sufficient information to make a reasonable

judgment as to whether the proposed discharge will comply with these Guidelines..... ☐

PROJECT COMPONENT: INFRASTRUCTURE (ROADS, PIPELINES, BUILDING, STRUCTURAL & MATERIAL STOCKPILING PADS, BORROW PITS, POND BERMS, CREEK DIVERSION DAM, PLUNGE POOL, SPILLWAY, OTHERS)

I. Evaluation of Compliance with 404(b)(1) Guidelines [restrictions on discharge, 40 CFR § 230.10(a)-(d)]

a. Alternatives Test. Refer to information discussed in the DSEIS, plus the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references. Also, see the FSEIS, Section 2.3 (Project Components Studied in Detail, to incude 2.3.8 (Diversions and Storm water), 2.3.11 (Employee Housing and Transporation), 2.3.12 (Power Supply, 2.3.16 (Borrow Areas), and 2.3.17 (Roads and Bridges).

	Yes	No
(1) Is there a practicable alternative to the proposed discharge, which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences? (For this requirement practicable alternatives may include activities which do not involve discharges to waters of the U.S. or discharges at other locations in waters of the U.S.) *The applicant submitted a Practicability*	*15 ☐	☒

Analysis and a Cost Analysis breakdown for the proposed action, Alternative D, along with its respective alternative (described in POA-1990-592-2), also referred to as Alternative A. The Alaska Department of Natural Resources (ADNR) analyzed the practicability of the applicant's preferred alternative versus Alternative A, and determined[14] *that alternative A was neither practicable nor reasonable from the standpoint of cost or economics. The Corps reviewed these documents and other relevant information and independently determined that the previously authorized site was not practicable to the applicant due to cost and logistics, and that based on the similarities (location, logistics of material transport, construction and operation of the facility, etc) of the alternative variants of Alternative A (Alternatives A1 through A3), these three variations are also not practicable. All of the infrastructure items (listed above), with the exception of the creek diversion dam (which must be located in the creek in order to divert water), were designed to avoid placement in waters of the U.S. to the maximum extent practicable. Where placement in waters of U.S. was necessary, impacts were mini-*

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[14] ADNR Letter, dated December 1, 2004, addressed to the USFS.

mized to the maximum extent practicable.

(ii) If the project is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no less environmentally damaging practicable alternative sites available? *The proposed project infrastructure components would be located primarily in wetlands, with the exception of the Mid Lake East Fork Slate Creek diversion dam which would be located within the creek channel. The creek channel is not a special aquatic site. The discharges for roads, building pads, and other infrastructure are not water dependent as they do not require access or proximity to or sitting in special aquatic sites in order to fulfill their basic purpose. The applicant considered other alternatives and clearly demonstrated that there were no practicable alternatives that were less damaging to the aquatic ecosystem. The applicant has also avoided and minimized to the maximum extent practicable. The Corps examined the proposed sites and all available information and determined that the sites for the infrastructure items would be the least environmentally damaging practicable alternative.*	* ☒	☐

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[15] An * is marked above the answer that would indicate noncompliance with the Guidelines.

b. Special restriction. Will the discharge:
Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.

(i) Violate State water quality standards? [16] *The Alaska Department of Environmental Conservation (ADEC) has issued a Section 401 Water Quality Certification, dated May 6, 2005, which pertains to each of the 404 discharges. Also, see FSEIS Appendix A, Water Quality Analysis.*	* ☐	☒
(ii) Violate toxic effluent standards (under Section 307 of the Act)? *DSEIS: Section 4.6, Appendix A: Surface Water Quality. FSEIS: Appendix A - Water Quality Analysis.*	* ☐	☒
(iii) Jeopardize endangered or threatened species or their critical habitat? *DSEIS: Sections 4.10 and 4.11. FSEIS: Sections 4.10.3, and 4.11.2. Also, refer to attached Rod, discussion of comments received, with specificity to ESA consultation.*	* ☐	☒
(iv) Violate standards set by the Department of Commerce to protect marine sanctuaries? *NA. There are no marine sanctuaries on or near the project site.*	* ☐ NA	☐ NA

c. Other restrictions. Will the discharge contribute to significant degradation of "waters of the United States" through adverse impacts to:

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[16] ADEC letter to the Corps, dated December 6, 2004.

[*Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references. Also, see the FSEIS: Appendix A, Water Quality Analysis.*]

	Yes	No
(i) Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and special aquatic sites? *See DSEIS: Sections 4.8, Groundwater Quality; 4.6, Surface Water Quality; and 4.12, Soils, Vegetation, and Wetlands. FSEIS: Section 4.7.3, Groundwater Quality; 4.5.6, Surface Water Quality; 4.12.3, Wetlands.*	* ☐	☒
(ii) Life stages of aquatic life and other wildlife? *DSEIS: Sections 4.11, Wildlife; and 4.12, Soils, Vegetation, and Wetlands. Also, refer to Section XI of the ROD.*	* ☐	☒
(iii) Diversity, productivity and stability of the aquatic life and other wildlife or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy? *DSEIS: Sections 4.6; 4.9; 4.11; and 4.12. FSEIS:4.9.6., 4.11.2., and 4.12.3.*	* ☐	☒
(iv) Recreational, aesthetic and economic values? *DSEIS: Sections 3.13 through 3.15; and 4.13 through 4.15. FSEIS: 4.13.3., 4.14.3., 4.15.3.*	* ☐	☒

d. Actions to minimize potential adverse impacts (mitigation). Will all appropriate and practicable steps (40 CFR § 230.70-77, Subpart H) be taken to minimize the potential adverse impacts of the discharge on the aquatic ecosystem? *[Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.] DEIS: Section 2.5. FSEIS: Section 2.5.1: Mitigation. For follow-up, refer to ROD, Section VII, Subpart G.*	☒	☐ *

II. Factual Determinations (40 CFR § 230.11)

The determinations of potential short-term or long-term effects of the proposed discharges of dredged or fill material on the physical, chemical and biological components of the aquatic environment included items a – h, below, in making a findings of compliance or non-compliance.

Subpart C: Potential Impacts on Physical & Chemical Characteristics of the Aquatic Ecosystem;

Subpart D: Potential Impacts on Biological Characteristics of the Aquatic Ecosystem;

Subpart E: Potential Impacts on Special Aquatic Sites; and

Subpart F: Potential Impacts on Human Use Characteristics.

Subpart G: Evaluation and Testing

There is potential for short-term or long-term adverse effects (in light of Subparts C-G, listed above) of the proposed discharge as related to:

	Yes	No
a. Physical substrate determinations *[FSEIS: Section 4.12.1; Appendix C].* *The vegetative substrate under the proposed structures is primarily emergent, scrub-shrub or forested wetlands, all of which would be mechanically land cleared prior to the deposition of fill to construct the required infrastructure.*	☒	☐
b. Water circulation, fluctuation and salinity determinations *[FSEIS: Section 3.6 through 3.10; and Section 4.5.3 (Effects Common to Alternatives B, C, and D)]* *Few of the impacted wetlands have standing water which circulate. However, these same waters do respond (storage) to heavy periods of precipitation. The proposed discharges are conditioned to prevent substantial changes. These are freshwater systems, salinity determinations are not applicable.*	☒	☐
c. Suspended particulate/turbidity determinations *[See FSEIS, Section 4.6.4 (Effects Common to Alternatives B, C, and D), and Section 4.9 (Aquatic Resources: Freshwater).* *The permit would be conditioned to require stabilization of all disturbed soils in order to*	☒	☐

prevent erosion of disturbed sediments into waters of the U.S.

d. Contaminant determinations ☐ ☒
[See FSEIS, Section 4.6.4 (Effects Common to Alternatives B, C, and D [Accidental Spills], and Section 4.6.6. through 4.6.7.)
Only clean material would be discharged..

e. Aquatic ecosystem structure and function determinations ☒ ☐
[FSEIS: Section 4.9 and 4.12]
Modification of the area wetlands would result in the short-term modification of the area's aquatic ecosystem and functions. These would be restored upon project closure. A portion of the East Fork Slate Creek would be converted to deepwater habitat.

f. Proposed disposal site determination (disposal sites and/or size of mixing zone are acceptable) ☐ ☒
[FSEIS: Section 2, Description of proposed actions and other Alternatives].

g. Determination of cumulative effects on the aquatic ecosystem ☐ ☒
[FSEIS: Sections 4.12, and 4.21 (Cumulative Effects)]

h. **Determination of secondary effects on the aquatic ecosystem**
[FSEIS: Section 4.0] ☒ ☐
Secondary effects of the proposed discharges would include noise and air quality due to heavy equipment operation to construct the operation. As well as those impacts associated with the operation of the mine.

III. Technical Evaluation Factors 40 CFR § 230 Subparts C-F

a. Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem (Subpart C) *FSEIS-Section 4.0 Environmental Impacts*	Significant	Not significant
1. Substrate *[FSEIS: Sections 4.3 (Geology & Geochemistry) and 4.4 (Geotechnical Stability), Also, Section 2.3 (Project Components Studied in Detail].*	☐	☒
2. Suspended particulates/turbidity *[FSEIS: Section 4.5, and 4.9] Only clean material would be used and all fills would be required to be stabilized to minimize turbidity.*	☐	☒
3. Water *[FSEIS: Section 4.5 through 4.10]*	☐	☒
4. Alteration of current patterns and water circulation *[FSEIS: Section 4.5] There is little surface water present in the wetlands where the majority of the infrastructure components would be constructed. The diversion dam in Mid Fork East Slate Creek would result in water being piped below the tailings dam where it would reenter Slate Creek*	☐	☒

5. Alteration of Normal Water fluctuations/hydro period *[FSEIS: Sections 4.5 and 4.7].* *The Alaska Department of natural Resources, Office of Habitat Management and Permitting regulates water levels in Slate Creek which would result from releases of water below the proposed dam, and a permit has been issued to the applicant. The wetlands at the project site are not normally inundated.*	☐	☒
6. Alteration of salinity gradients *[FSEIS: Section 4.3]* *NA. The aquatic resources that would be impacted are freshwater.*	☐	☐

b Potential Impacts on the Biological Characteristics of the Aquatic Ecosystem (Subpart D)

7. Threatened and Endangered species (§ 230.30) *NA. There are no threatened or endangered species or their critical habitat within these portions of the project site.*	☐	☐
8. Aquatic Food Web (§ 230.31) *[FSEIS: Sections 4.9 & 4.10]* *The discharge of fill for construction of the infrastructure components would result in the elimination of the food web that these wetlands provide. After*	☐	☒

project these functions would be restored.

9. Other wildlife *[FSEIS: Section 4.11]. Construction and operation of the various infrastructure components would affect (e.g., limit travel) wildlife and waterfowl use of the area. This effect would be minimal due to the historic and current use of the site for mine operations. Upon project closure and reclamation of the site the use by wildlife would increase.* ☐ ☒

c Potential Impacts on Special Aquatic Sites (Subpart E)

1. Wetlands *[FSEIS: Sections 4.9 & 4.12]. The wetlands present at the project site include emergent, scrub-shrub and forested the infrastructure (roads, pipelines, borrow pits, structural pads) would result in the temporal loss of these wetlands. Upon project closure they would be restored.* ☐ ☒

2. *Sanctuaries* and refuges *[FSEIS: Section 4.11] NA. There are no sanctuaries or refuges in the project area.* ☐ ☐

3. Mud Flats – *NA. There are no mud flats in the project area.*	☐	☐
4. Vegetated Shallows – *NA. There are no vegetated shallows in this portion of the project area.*	☐	☒
5. Coral reefs – *NA. There are no coral reefs in the project area.*	☐	☐
6. Riffle and pool complexes [*FSEIS: Section 4.9*] – *NA. The infrastructure components would not be located in riffle / pool complexes.*	☐	☒

e Potential Effects on Human Use Characteristics (Subpart F)

Description of Social Environment [Base condition]: See FSEIS, Sections 4.0 Environmental Impacts, and 3.15 Socioeconomics.

1. Effects on municipal and private water supplies - *NA. The project would not impact municipal or private water supplies.*	☐	☐
2. Recreational and Commercial fishing impacts (including subsistence fishing) *FSEIS: Sections 4.15 & 4.20. NA. The creeks and other waters of the U.S. at the site are not subject to fishing,*	☐	☐

whether subsistence, recreational or commercial.

3. Effects on water-related recreation *[FSEIS: Section 4.13] NA. The area isolated from roads and has not been recorded as having any recreational values. The proposed discharges would not impact water related recreation.*	☐	☐
4. Aesthetics *[FSEIS: Section 4.14] The discharges would adversely impact the sites' aesthetic values. However, the impact is not substantial due to the isolation of the project area, and its historical use for mining.*	☐	☒
5. Effects on parks, National and historic monuments, National seashores, wilderness areas, research sites, and similar preserves. *NA. The project is not located in any of these areas.*	☐	☐

IV. Evaluation of Dredged or Fill Material (Subpart G, 40 CFR § 230.60)

c. The following information has been considered in evaluating the biological availability of possible contaminants in dredged or fill material: (checked boxes apply). *Section 2.3, Project Components Studied in Detail]*

8. ☒ Physical characteristics (receiving waters, bottom sediments, slurry constituents).
9. ☐ Hydrography in relation to known or anticipated sources of contaminants
10. ☐ Results from previous testing of the material or similar material in the vicinity of the project
11. ☐ Known, significant, sources of persistent pesticides from land runoff or percolation
12. ☐ Spill records for petroleum products or designated (§ 311 of CWA) hazardous substances
13. ☒ Other public records of significant introduction of contaminants from industry, municipalities or other sources
14. ☒ Known existence of substantial material deposits of substances which could be released in harmful quantities to the aquatic environment by man-induced discharge activities

b. An evaluation of the information above indicates that there is reason to believe the proposed dredged or fill material is not a carrier of contaminants, or that levels of contaminants are substantively similar at extraction and disposal sites. ☒ Yes ☐ No ☐ Unknown
Only clean material would be discharged.

c. Is the discharge site adjacent to the extraction site and subject to the same sources of contaminants, or are the materials at the two sites substantially similar? ☒ Yes ☐ No ☐ Unknown

d. If there is a high probability that the material proposed for discharge is a carrier of contaminants, or are there constraints available that are acceptable to the permitting authority and the

Regional Administrator to reduce potential contamination to acceptable levels within the disposal site? ☐ Yes ☐ No
Only clean material would be discharged.

V. Disposal Site Determination 40 CFR § 230.11(f)

The following factors, as appropriate, have been considered in evaluating the disposal (discharge) sites.

1. Depth of water at the disposal site ☒
2. Current velocity, direction, and variability at disposal site ☒
3. Degree of turbulence ☐
4. Water column stratification ☐
5. Discharge vessel speed and direction ☐
6. Rate of discharge ☐
7. Dredged material characteristics ☒
8. Other factors affecting rates and patterns of mixing ☒

d. An evaluation of the appropriate factors in V.a. above indicates that the disposal site and/or size of mixing zone is acceptable. ☒ Yes ☐ No

VI. Actions to Minimize Adverse Effects (Subpart H, 40 CFR § 230.70)

All appropriate and practicable steps would be taken, through application of recommendations of § 230.70 - 230.77, to ensure minimal adverse effects of the proposed discharge. ☒ Yes ☐ No

Actions taken: Inclusion of Best Management Practices in the Mining Plan of Operations (POO), DA Permit Special Conditions to include incorporation of the Mining POO, inclusive of reclamation appen-

dix. See Attachment D to the ROD, for a list of Special Conditions to be appended to the Corps (DA) permit. State and local permits have been conditioned to reduce impacts resulting from the material discharge into waters of the United States, including wetlands, for the supporting mining infrastructure (embankment, plunge pool, spillway, water treatment facility pad, etc).

VII. Findings of Compliance or Non-compliance (40 CFR § 230.12)

a. ☐ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for discharge of dredged or fill material complies with the Section 404(b)(1) guidelines

b. ☒ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for the discharge of dredged or fill material complies with the Section 404(b)(1) Guidelines with the inclusion of the appropriate and practicable discharge conditions to minimize pollution or adverse effects to the affected aquatic ecosystem. See Attachment D for a complete list of Special Conditions to be attached to the permit.

c. ☐ The proposed disposal site for discharge of dredged or fill material does not comply with the Section 404(b)(1) guidelines for the following reasons:

1. There is a less damaging practicable alternative ☐

2. The proposed discharge will result in significant degradation of the aquatic ecosystem ☐
3. The proposed discharge does not include all practicable and appropriate measures to minimize potential harm to the aquatic ecosystem ☐
4. There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines. ☐

APPENDIX S

Department of Army, Corps of Engineers

Alaska District

Section 404(b)(1) Evaluation
and
Public Interest Review

Cascade Point Docking Facility
POA-1997-245-N

I. INTRODUCTION

Goldbelt, Incorporated (Goldbelt) has requested authorization for the discharge of dredged and/or fill material in waters of the United States (U.S.) under Section (§) 404 of the Clean Water Act (CWA), and for work in, on, over or under navigable waters of the U.S. under §10 of the Rivers and Harbors Act (RHA) of 1899, for construction of a docking facility to improve access to their property located at Echo Cove/Cascade Point. The evaluation requirements of Section 404 CWA are within the guidelines developed by the Administrator of the EPA in conjunction with the Secretary of the Army, published in 40 Code of Federal Regulations (CFR), Part 230, and referred to as the Section 404 (b)(1) Guidelines[1] (Guidelines). This Section 404(b)(1) evaluation and public interest review addresses the potential impacts of the discharge of dredged and/or fill material into waters of

[1] 40 CFR 230

the U.S. by Goldbelt. This document will be attached to, and become a part of, the Corps Record of Decision for the Kensington Mine and Cascade Point projects.

The proposed project and its related impacts were described in the U.S. Forest Service's (USFS) Cascade Point Final Environmental Impact Statement (FEIS), dated March 10, 1998, which was for an access road and a marine terminal docking facility to be constructed on USFS and Goldbelt property, and later in the Corps' combined decision document/environmental assessment (EA), dated June 12, 1998. The project and its related environmental impacts, was again discussed in the Draft Supplemental Environmental Impact Statement (DSEIS) for the Coeur Alaska, Incorporated, (Coeur) Kensington Gold Project[2]. This DSEIS was prepared by Tetra Tech, Incorporated, for the USFS, January 23, 2004, and described Cascade Point as one of several potential destination docking facilities for the transport (ferry shuttles) of the Kensington mining personnel, and it was discussed more recently in the Final Supplemental Environmental Impact Statement (FSEIS), dated December 2004, for the Kensington Gold Project. These above referenced documents[3] included a complete project impact analysis and review

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[2] POA-1990-592-M, Kensington Gold Mine Project

[3] The USFS' EIS, DEIS and the FSEIS are all available at the USFS, 8465 Old Dairy Road, Juneau, AK 99801. A copy of each was referenced, and incorporated into the case file. These as well as the other referenced documents are available for viewing at the Corps of Engineers, Suite 106, 8800 Glacier Highway, Juneau, Alaska 99801.

of the direct, secondary, and cumulative, impacts of the project, as well as pertinent alternatives. The previous Corps decision documents are at Attachment F of the ROD, and the relevant portions of the 1998 Cascade....

* * * * *

See also the original Corps' Combined Permit Evaluation and Decision Document, dated June 12, 1998, Section F, Cumulative Impacts.

NMFS Recommendation #5: NMFS stated in their letter that the proposed project "...may affect endangered humpback whales, threatened Stellar sea lions which are protected from harm under the ESA, and may harm other marine mammals what are afforded protection from harm under the Marine Mammal Protection Act." NMFS requested that the Corps begin consultation with NMFS pursuant to Section 7 of the Endangered Species Act (ESA), stating that the original Biological Opinion prepared by the Corps for the original permit application by Goldbelt was outdated and should be revised with new information specific to Berners Bay.

Corps Response to NMFS: The Corps initiated informal consultation on June 21, 2004, pursuant to Section 7 of the ESA, with the NMFS, and later, jointly with the USFS on November 16, 2004, requested formal consultation by submitting a Biological Assessment/Biological Evaluation (BABE) stating that both agencies had jointly determined that the project was not likely to adversely affect threatened and endangered species (humpback whale and Stellar sea lions) within the project area.

The NMFS acknowledged receipt of the joint request for formal consultation pursuant to Section 7 of the

ESA, stating that they had reviewed the BABE, and disagreed with the conclusion. However, on March 18, 2005, the NMFS completed their Biological Opinion, and recommended denial of the Cascade Point project and included 16 Conservation Recommendations. These are addressed below.

Comment dated September 13, 2004. The NMFS referenced their earlier comments of August 19, 2004, reiterating that the Corps should prepare an EFH assessment and initiate consultation under the ESA. The NMFS again recommended denial of the permit referencing Part IV, 3(b) of the MOA between the Corps and the Department of Commerce.

Corps Response to NMFS: See the Corps response to the NMFS' Recommendations #1 and #5, Comment dated August 19, 2004, above.

National Marine Fisheries Service, Protected Resources Division, Endangered Species Act (ESA) Consultation Process:

The Corps initiated informal consultation pursuant to Section 7 of the ESA, with the NMFS, and later, jointly with the USFS, formal consultation and submitted a Biological Assessment/Biological Evaluation (BABE) stating that both agencies had determined that the project was not likely to adversely affect threatened and endangered species (humpback whale and Stellar sea lions) within the project area.

Comment dated December 3, 2004. The NMFS acknowledged receipt of the joint request for formal consultation pursuant to Section 7 of the ESA, stating that they had reviewed the BABE, and disagreed with the conclusion of the Corps and the USFS. The letter went on to discuss several factors which NMFS felt were of importance: regularity of shuttle transit

of the bay, vessel speed, construction of a dock at Cascade Point (Goldbelt application) and at Slate Creek Cove (Kensington application), and the usage of these facilities by members of the public. NMFS recommended looking for an alternative site to the Cascade Point site, and suggested the suspension of vessel traffic within Berners Bay at pre-selected dates and times. NMFS stated in their letter "during formal consultation, Federal action agencies may not make any irreversible or irretrievable commitment of resources that limits future options. This practice insures that agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of T&E species or destroying or modifying their critical habitats."

Comment dated March 18, 2005. The NMFS completed their Biological Opinion (BO) and also included 16 Conservation Recommendations, which are addressed below.

The BO concluded with the following:

(a) "...the proposed action is not likely to jeopardize the continued existence of the western population of Steller sea lions."

(b) "...the proposed action is not likely to jeopardize the continued existence of the eastern population of Steller sea lions."

(c) "...the proposed action is not likely to jeopardize the continued existence of the Central North Pacific population of humpback whales."

However, the BO also concluded that individual Steller sea lions and individual humpback whales in the project area might be adversely affected, since

the project site would be located within the known or historic range of these mammals.

The referenced "proposed action" stated in the BO is the work associated with the Plan of Operations (POO) for the Kensington Gold Mine project. The POO addresses the use of Cascade Point as a marine docking facility only as a mine crew shuttle embarkation/debarkation point, and to be used for no other stated purpose. For this reason, the BO did not address other uses to which the marine docking facility might be put to in the future,. such as tourism, commercial transport, log transfer facility, personal usage, etc. See Consideration of Comments, National Marine Fisheries Service, below.

Denial Recommendation. The NMFS stated, on page 128 of their BO, their continued recommendation that Goldbelt seek an alternative location to the Cascade Point facility, preferably outside of Berners Bay.

Corps Response to ESA: The Corps has determined that the current proposal is the least environmentally damaging, practicable alternative. See Section VI Alternative Analysis, above.

Recommendation #1. "Any crew shuttle transits across Berners Bay during the eulachon run and herring spawning periods of April and May should be suspended. NMFS recommends use of other transportation routes during this time to minimize adverse effects listed species and their prey base." Also, "...that Coeur limit disturbance from vessel noise, lights, and other sources that may discourage herring from utilizing spawning habitat in the vicinity of Cascade Point."

Corps Response to ESA: The timing and routing of the Kensington mine shuttle vessels transiting

Berners Bay are addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan Of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #2. "Fueling of vessels at the Cascade Point marine docking facility should be prohibited from the time pre-spawning aggregations of herring are observed around the dock facility until herring eggs have hatched."

Corps Response to ESA: The U.S. Forest Service's Mining Plan of Operations addressed fueling of vessels at this facility for the Kensington Gold Mine Project. Also, the state's Submerged Lands Permit carries conditions pertinent to the storage of fuel as well as fueling operations at Cascade Point. Vessel fueling of the Kensington mine shuttle at the Cascade Point marine facility is addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #3. "Dock facilities should serve only the Kensington Gold Project and public or other private uses should be entirely restricted in order to

protect and avoid additional cumulative impacts to marine mammal populations in Berners Bay."

Corps Response to ESA: The City & Borough of Juneau Conditional Use Permit restricts use of the dock to Kensington Mine Shuttle operations. It should be recognized that the structure, if constructed, would provide a safe haven in the event of a storm event, and its use at that time or under similar circumstances by members of the public should not be restricted.

Recommendation #4. "Construction should not occur between March 15 and June 30 to minimize potential noise impacts to marine mammals." And, "NMFS recommends that near-water construction occur during winter months when fewer marine mammals are present."

Corps Response to ESA: The following special condition will be incorporated into the Corps permit, if authorized:

> *No in-water construction work shall occur in Berners Bay between March 15 through June 30, to protect juvenile salmonids, herring, eulachon, and marine mammals.

Recommendation #5. "NMFS recommends the use of appropriate in-water noise control measures (e.g., mufflers, bubble curtains) or other technology for construction equipment and activities to minimize the effects of construction noise. NMFS also recommends the use of the additional noise reduction measures described in the BA/BE (e.g., instituting speed limits, controlling helicopter altitudes, implementing flight path requirements, refraining from compression braking on haul roads from the Slate Creek Dock to the mining site).

Corps Response to ESA: See Corps Response to Recommendation number 6, below. The placement of structures into waters of the U.S. and the control of helicopter and/or vessel operations, to include route selection, vessel fueling, flight altitudes, speed limits, as well as in-water noise control measures are addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur (2005), Goal #5 SOP #11 and SOP #12. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Corps permit. The operational control for vehicle speeds, braking procedures, and noise, as well as other noise sources, including blasting are controlled through the USFS Plan of Operation.

Recommendation #6. "In-water construction should occur outside of appropriate timing windows that protect out migrating juvenile salmonids, and spawning and rearing marine forage fish." And, "...we also recommend using vibratory hammers whenever and wherever practicable except for the final few minutes needed to proof piles when an impact hammer must be used."

Corps Response to ESA: The following special conditions will be incorporated into the Corps permit, if authorized:

> *All steel piles shall be driven using a vibratory hammer. Under those conditions where impact hammers are required for reasons of seismic stability or substrate type, the piles shall be driven as deep as possible with a vibratory hammer prior

to the use of the impact hammer. The impact hammer shall be used at a time of year when larval and juvenile stages of fish species are not present: this will be coordinated with the Alaska Department of Natural Resources, Habitat.

*All piles shall be driven when the current is reduced (i.e., centered on slack current) to minimize the number of fish exposed to adverse levels of underwater sound.

*Permittee shall either use a block of wood between the impact hammer and the pilings, and/or use a bubble curtain to attenuate the sound.

Recommendation #7. "As included in the USFS SEIS' Best Management Practices, NMFS recommends the use of silt curtains or other methods to prevent sedimentation of coastal habitat areas from construction activities."

Corps Response to ESA: The following special condition will be incorporated into the Corps permit, if authorized:

*Silt curtains or other appropriate methods shall be used to confine suspended particles and turbidity to a small area where settling can occur at the docking facility construction site (see 40 CFR 230.73(c)), and may include baffles to decrease turbulence and increase retention time or a filter blankets and curtains to filter out suspended solids.

Recommendation #8. "A marine biologist should monitor construction activities' effects on marine mammal behavior to ensure that impacts on marine mammals will be minimal. Monitoring results should be submitted to NMFS and USFS annually to determine if protection requirements have been met."

Corps Response to ESA: The request of having a marine biologist monitoring marine mammal behavior is addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan Of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #9. "Vessel traffic should be minimized after dark, especially during spring eulachon/herring runs when Stellar sea lions and humpback whales are most likely to be foraging near the surface and along the route of the crew shuttle, increasing the likelihood of disturbance to both predators and prey from vessel noise and presence."

Corps Response to ESA: The timing and routing of shuttle vessels transiting Berners Bay are addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #10. "Vessels should be operated year-round at speeds not exceeding 13 knots."

Corps Response to ESA: Vessel operations in Berners Bay are addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See

Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated, as a condition of the Kensington Mine permit.

Recommendation 11. "Quieting techniques should be adapted to vessels associated with the Kensington Gold Project, particularly the crew shuttle, to minimize noise disturbance to listed species and their prey in the action area."

Corps Response to ESA: Quieting techniques is addressed in the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit. Also, see the Corps response to Recommendation 5, above.

Recommendation #12. "As the proposed action increases vessel traffic in an area where disturbance and collision risk have been minimal in the past, NMFS recommends that vessel-operating procedures be monitored and evaluated to determine if they are effective at protecting sea lions and whales in the waters of Berners Bay."

Corps Response to ESA: The monitoring of vessels' operations transiting Berners Bay is addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of

Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #13. "NMFS recommends that a marine mammal observer monitor crew shuttle operations during the entire year, beyond simply the April/May time period, to ensure that impacts on marine mammals are minimized and properly mitigated. Monitoring results should be submitted to NMFS and USFS annually to determine if protection requirements have been met."

Corps Response to ESA: The presence of a trained observer on or monitoring of vessels transiting Berners Bay is addressed in the *Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan*, prepared by Coeur (2005), Goal #5, SOP #4 and SOP #7. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #14. "NMFS recommends that USFS and ACOE [Corps] should complete the spill prevention, control, and containment plan for approval by NMFS and other relevant agencies that addresses the potential for catastrophic spill (i.e., in the event that a 6,500 diesel fuel isotainer was to leak or rupture during transport, loading, or offloading)."

Corps Response to ESA: EPA amended the Oil Pollution Prevention regulation at Title 40 of the Code of Federal Regulations, Part 112, (40 CFR 112). The regulation incorporated revisions proposed in 1991, 1993, and 1997. Subparts A through C of the Oil Pol-

lution Prevention regulation are often referred to as the "SPCC rule" because it describes the requirements for certain facilities to prepare, amend and implement Spill Prevention, Control and Countermeasure (SPCC) Plans.

The regulation requires that all regulated facilities have a fully prepared and implemented Spill Prevention, Control, and Countermeasure, or SPCC Plan. A licensed professional engineer must certify the SPCC Plan. Facilities must implement the Plan, including carrying out the spill prevention and control measures established for the type of facility or operations, such as measures for containing a spill (e.g., berms). In the event that a facility cannot implement containment measures, the facility must demonstrate that secondary containment is impracticable; conduct periodic integrity and leak testing of bulk containers and associated valves and piping; develop and incorporate a strong spill contingency plan into the SPCC Plan; and provide a written commitment of manpower, equipment, and materials required to quickly remove any quantity of oil discharged that may be harmful. In addition, facility owners or operators must conduct employee training on the contents of the SPCC Plan. Facilities that become operational between August 17, 2002 and August 18, 2006 must prepare and implement an SPCC Plan by August 18, 2006. Facilities that become operational after August 18, 2006, must prepare and implement a Plan before beginning operations.

Therefore, since preparation and implementation of a SPCC plan is the responsibility of the facility operator (Coeur or Goldbelt), with oversight provided by the USEPA, the Corps permit will not carry this

condition separately. The Corps will supply an advisory to the permittee.

Recommendation #15. "...NMFS recommends that monitoring be directed toward adaptive management. We further recommend that our agency and other natural resource agencies be able to independently review collected data to assess impacts. If impacts are detected from project activities, USFS and ACOE should consult with NMFS to determine how to adjust the action effectively."

Corps Response to ESA: The Corps will conduct normal monitoring of permit compliance in the project area, but will not be actively conducting any additional requested monitoring studies in the project area. Second, it is understood that most if not all of the proposed actions associated with the Cascade Point Marine Docking Facility would result in impacts,-whether to the physical, social and/or biological environment, and these have been discussed in the FSEIS, along with the means to mitigate for them. Also, several Federal and State resource agencies will be conducting monitoring activities at the project site and within Berners Bay. If adverse impacts different than those already discussed and mitigated for are detected, the Corps will coordinate corrective efforts with all appropriate Federal, State and local resource agencies.

Recommendation #16. "...NMFS recommends that Coeur support such research efforts in the action area throughout the course of the Kensington Gold Project, and use best available technology to design any breakwater structure so that the probability of recreating productive herring spawning habitat is maximized."

Corps Response to ESA: The current breakwater design for both the Goldbelt and the Kensington projects have been submitted and published in the Corps' public notices for public review and have not generated any negative responses with respect to its habitat potential (e.g., herring, kelps and fucus, bivalves, echinoderms, crustaceans).

e. U.S. Coast Guard [USCG]: The USCG requested that Goldbelt affix "a Flashing six second white light (FL 6s) on top of the outermost portion of the rubble mound..." See Consideration of Comments, below.

STATE AND LOCAL AGENCIES:

Alaska Department of Natural Resources, Habitat Division [ADNR-H] did not comment to the Corps: ADNR-H was a cooperating agency to the USFS' EIS, and commented directly to and coordinated with the USFS, on issues pertaining to habitat concerns respective to both the Kensington Gold Project and to Goldbelt's proposed marine docking facility. This coordination resulted in conditioning of the State of Alaska Tidelands permit and the State of Alaska Habitat permits. Additionally, issues and/or concerns raised by ADNR-H were also addressed in the USFS' FSEIS, Chapter 4.

Though the Alaska Department of Natural Resources, Division of Parks and Outdoor Recreation, Office of History and Archaeology [SHPO] did not comment to the Corps, and though SHPO did not relate any issues pertaining to impacts to aquatic resources to the Corps, SHPO related issues pertaining to Cascade Point were addressed in Chapter 4 of the USFS' FSEIS.

The City and Borough of Juneau (CBJ) issued a Conditional Use Permit to Goldbelt, Inc., with sev-

eral conditions. The conditions of special interest to the Corps are listed as follows:

> #1. No vessel fueling is authorized to occur at this location except vessels used for transporting mineworkers to the Slate Creek Cover marine docking facility and craft necessary for facility operation and maintenance, including fuel spill responsibilities.
>
> #15. Coeur-Alaska will prepare and implement a Spill Response Plan for Cascade Point as identified in their September 2004 Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, as Standard Operating Procedure.
>
> #13. A draft plan will be circulated to Federal and state agencies with responsibility for water quality and spill prevention and response, and to the CBJ, for review. Coeur shall implement a final plan before docking facility operations begin.
>
> #17. Fueling will take place at a U.S. Coast Guard approved facility outside of Berners Bay between April 15 and May 15 each year when herring are observed spawning within 250 meters of the marine docking facility. The distances shall be clearly marked on the shoreline. A qualified observer whose salary and expenses shall be reimbursed by Goldbelt will determine the presence of spawning herring.

ORGANIZATIONS

Lynn Canal Conservation, Inc. [LCC]. See the Corps response to these issues below.

The LCC stated their opposition to the proposed changes to the Kensington Mine Project. This in-

cluded "harm to public interest natural resources; failure to adequately address cumulative (past, present and future) impacts; and piece-mealing of the mine-related activities, excluding potential impacts that might result if mining were to be extended for a greater period. LCC contended that the Corps' permit, if authorized, would authorize Goldbelt to construct an industrial port facility in Slate Creek Cove, and authorize Goldbelt, Inc., to construct a similar facility at Cascade Point. LCC also stated their opposition to "Federal approval of the disposal of processed mining waste into waters of the United States.

Southeast Alaska Conservation Council [SEACC). See the Corps response to these issues, below.

SEACC commented to the intention of Goldbelt to construct an "industrial-sized moorage facility" at Cascade Point, and that the Corps public notice was premature since the USFS had not yet approved any modifications to the Plan of Operations for the Kensington Mine. They were also concerned that the Corps had not entered into consultation pursuant to the Endangered Species Act (ESA), nor had the Corps adequately considered the cumulative impacts of all of the projects currently under consideration for the Berners Bay area, to include the Corps authorized Goldbelt road, and the proposed access road. SEACC went on to request that the Corps publish a second public notice to address the proposed docking facility, the Cascade Point access road, and all other structures on Goldbelt's master plan, to include all upland structures.

SEACC also addressed the potential for Goldbelt to use the facility at Yankee Cove as an alternative to constructing a ....

* * * * *

Water quality impacts associated with certain petroleum products, with emphasis on polycyclic aromatic hydrocarbons (PAHs).

Potential contamination from PAH originating from creosote piling has been mitigated for by use of steel piling. See also responses to ESA recommendations 2 and 14 above.

"The proposed project is part of a series of interrelated activities planned by Goldbelt . . . in conjunction with reasonably foreseen development of homes and businesses, daily commuter ferry service, mining and road building . . .", NMFS requested a comprehensive environmental impact statement to address these 'foreseeable' actions and related impacts.

See the original Corps' Combined Permit Evaluation and Decision Document, dated June 12, 1998, Section F, Cumulative Impacts, and the 2004 FSEIS cumulative impact analysis.

The following conditions were included in the Alaska Department of Environmental Conservation's (ADEC) Certificate of Reasonable Assurance:

1. Petroleum spill response equipment and supplies shall be available at the marine docking facility to contain and clean up any fuel spills which may occur during the construction or operation phase.

2. The wooden portions of the docking facility docking shall not be treated with a preservative containing pentachlorophenol and if treated with creosote, the creosote shall be applied via pressure treatment that inhibits leaching at a rate that causes a sheen to form on the water.

3. Restroom and solid waste containment facilities shall be made available and maintained at the marine docking facility during the construction operation phases.

4. The dredging activity and spoils barge shall be enclosed within a silt curtain during dredging and spoils dewatering activity. If during dredging a silt plume is produced, dredging shall cease until the problem is resolved. Runoff resulting from dewatering the spoils or storing the spoils on uplands shall be directed into the enclosed area. The silt curtain shall extend a minimum of 20' below the surface at high tide. The structure shall remain until the silts have settled from the enclosed waters.

5. During breakwater construction, Goldbelt shall limit the introduction of silts into the marine waters. This can be done by utilizing fill clean of all silts and organics or by enclosing and isolating the fill area prior to fill placement with a silt curtain or similar structure. The silt curtain shall extend a minimum of 20' below the surface at high tide. The structure shall remain until the silts have settled from the enclosed waters."

(a)	Based on the discussion above, are there available, practicable alternatives having less adverse impact on the aquatic ecosystem and without other significant adverse environmental consequences that to not involve discharges into "waters of the U.S." or at other locations within these waters?	*	
		YES	X NO
(b)	Based on above, if the project	NA	

	YES	NO
is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no practicable alternative sites available?		

Alternative Test:

Special Restriction. Will the discharge:

(a) Violate state water quality standards?	*	
	YES	NO
(b) Violate toxic effluent standards [under Section 307] of the Clean Water Act?	*	X
	YES	NO
(c) Jeopardize endangered or threatened species or their critical habitat?	*	X
	YES	NO
(d) Violate standards set by the Department of Commerce to protect marine sanctuaries?	*	X
	YES	NO
(e) Evaluation of the information above, indicates that the proposed discharge material meets the testing exclusion criteria for the following reasons:	X	*
	YES	NO

[x] Based on the above information, the material is not a carrier of contaminants.

Other restrictions: Will the discharge contribute to significant degradation of "waters of the U.S." through adverse impacts to:

(a) Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and/or special aquatic sites?	* ____ YES	X NO
(b) Life stages of aquatic life and/or wildlife?	* ____ YES	X NO
(c) Diversity, productivity, and stability of the aquatic life and other wildlife? Or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy?	* ____ YES	X NO
(d) Recreational, aesthetic, and/or economic values?	* ____ YES	X NO
Actions to minimize potential adverse impacts [mitigation]? Will all appropriate and practicable steps [40 CFR 230.70-77] be taken to minimize adverse impacts of the discharge on the aquatic ecosystem?	X YES	* ____ NO

In accordance with 33 U.S.C. 1341(d), all conditions of ADEC's Certification are incorporated as part of the DA permit. Therefore, they are not listed as special conditions. ADEC's condition number 4 is required to meet the DA public interest criteria.

The following special conditions would also be added to the DA permit. Several of the following conditions are similar to those on the ADEC Certification and

are being carried here because we feel strongly that these conditions should be carried on the Corps permit for the life of the project, whereas the conditions on the ADEC certificate could be modified when the certificate is renewed.

1. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

* * * * *

11. The size of the fill footprint shall be restricted to minimize adverse environmental impacts to the Berners Bay ecosystem. Fill in the sub-tidal areas would be detrimental to marine fish rearing habitat and potentially could result in the declines of fish populations in nearby waters. Placing fill at low tides reduces the impacts of sedimentation on the marine ecosystem.

12. Although piling-supported structures will allow continued use of the project sites by many vertebrates and fish, much of the existing plant life is likely to be shaded and thereby lost. Therefore, in order to minimize this loss, the permittee shall use metal grating as a top surface, rather than planking, as this results in greater light

transmission to aquatic plants. Light penetration is needed to maintain intertidal habitat beneath structures such as walkways, catwalks, and gangways.

13. No portion of any floating structure may ground at any tidal stage. This is necessary to protect water quality and aquatic habitat by minimizing disturbance and introduction of suspended sediment, petroleum products, and toxic substances into the cove and outside waters.

14. Wooden surfaces of the structures that come into contact with the water shall not be painted or otherwise surface-treated with creosote and may not be treated with a preservative that contains pentachlorophenol. Creosote and pentachlorophenol are toxic to juvenile fish in marine waters.

15. No in-water construction work shall occur in Berners Bay between March 15 through June 30. This condition in necessary to protect juvenile salmonids, herring, eulachon and marine mammals.

16. Silt curtains or other appropriate methods shall be used to confine suspended particles and turbidity to a small area where settling can occur (see 40 CFR 230.73[c]). Other methods include: baffles to decrease turbulence and increase retention time; and filter blankets and curtains to filter out suspended solids.

17. The placement of fill material into marine waters shall only occur during low-water periods.

19. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.

19. No in-water construction work shall occur in Johnson Creek May 1 through October 1, in order to direct construction to low-flow periods.

20. Permittee shall insure that all accumulated sediment is removed from the breakwater breach.

General Evaluation. [33 CFR 320.4(a)].

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION COUNCIL; SIERRA CLUB; and LYNN CANAL CONSERVATION,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL TIMOTHY J. GALLAGHER, in his official capacity as District Engineer; LARRY L. REEDER, in his official capacity as Chief of the Regulatory Branch; DOMINIC IZZO, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); and UNITED STATES FOREST SERVICE,

Defendants.

Case No. J05-00012 CV (JKS)

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (5 U.S.C. §§ 702, 706(a)(A); 33 U.S.C. §§ 1311, 1316, 1342, 1344; 16 U.S.C. §§ 528-31, 551, 1600-14)

INTRODUCTION

1. This action challenges the final decision of Defendant United States Army Corps of Engineers (Corps) to issue a section 404 permit under the Clean Water Act, 33 U.S.C. § 1344, for the disposal of 4.5 million tons of mine waste into a lake in connection with the Kensington Gold Project. It also challenges the final decision of the United States Forest Service approving the mining company's plan of operations and a second Corps' section 404 permit for the construction a marine terminal facility at Cascade Point, both of which depend on the Kensington section 404 permit.

2. The Kensington Gold Project is a proposed gold mine located near Juneau, Alaska. Coeur Alaska, Inc., a wholly-owned subsidiary of Coeur D'Alene Mines Corporation, seeks to develop the mine. As part of the proposal, Coeur Alaska intends to discharge, on average, 210,000 gallons per day of untreated, processed mine waste (mine tailings) into a freshwater lake, Lower Slate Lake, through a 3.5-mile pipeline. Ultimately, these discharges will deposit 4.5 million tons of mine tailings in the lake.

3. On June 15, 2005, the Corps signed the section 404 permit authorizing this discharge on the ground that the processed mine waste constitutes "fill material." On November 22, 2005, the Corps suspended the permit to re-evaluate its decision. On March 29, 2006, the Corps reinstated the identical permit.

4. Lower Slake Lake is a sub-alpine lake with a surface area of approximately 20 acres. It is situated on public lands within the Tongass National Forest on a relatively flat, south-facing terrace in the middle portion of the East Fork Slate Creek watershed. Slate Creek contains a variety of fish species, including coho, pink and chum salmon, Dolly Varden char, and cutthroat trout. Lower Slate Lake is surrounded by steep coniferous forested lands and rare and important lacustrine and palustrine emergent wetlands. Lower Slate Lake supports fish populations, including about 1,000 Dolly Varden char. There is no historical mine-related disturbance in the Slate Creek watershed.

5. Lower Slate Lake (elevation 650 feet) is connected to Slate Creek, which feeds into Berners Bay approximately 2 miles downstream. Berners Bay is one of Southeast Alaska's exceptional resources. Situated along the east side of Lynn Canal, Berners Bay provides outstanding biological resources and recreational opportunities for boaters, fishers, hunters, and wildlife viewers. The bay and the rivers that feed into it provide spawning and rearing habitat for runs of eulachon; sockeye, coho, pink, and chum salmon; steelhead and cutthroat trout; and Dolly Varden char. Every spring, eulachon gather in the tens of millions and make a spawning run up the bay's tributaries. The run draws an abundant array of species that come to the bay to feed on the eulachon. Hundreds of Steller sea lions, harbor seals, bald eagles, and sea gulls, among other wildlife, have been observed descending on the bay in search of food during the eulachon run.

6. Plaintiffs are organizations whose members use Lower Slate Lake and Berners Bay for recrea-

tion, fishing, camping, photography, wildlife viewing, and other activities. These organizations seek declaratory and injunctive relief preventing Defendants from allowing harm to the lake and the bay, and thereby to their members, pending compliance with the law.

JURISDICTION, RIGHT OF ACTION, AND VENUE

7. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02. Judicial review available under the Administrative Procedure Act. 5 U.S.C. §§ 701-06.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

PLAINTIFFS

9. Southeast Alaska Conservation Council (SEACC) is a nonprofit organization of eighteen volunteer conservation groups in fourteen communities across the Southeast Alaska panhandle, from Yakutat to Ketchikan, and over 2000 individual members, the majority of whom live in Alaska. SEACC advocates the conservation and wise long-term management of the scenic, wilderness, fish, wildlife, recreation, subsistence and other natural resources and values of Southeast Alaska. SEACC's organizational members include Lynn Canal Conservation and the Juneau Group of the Sierra Club.

10. Sierra Club is a national grassroots conservation organization with about 767,000 members, including about 1,800 Alaska residents, who are inspired by nature. They explore, enjoy, and protect the wild places of the earth including the Berners Bay area of the Tongass National Forest. They prac-

tice and promote the responsible use of the earth's ecosystems and resources. For over a hundred years they have sought to educate and enlist humanity to protect and restore the quality of the natural and human environment. Sierra Club members reside in nearly every community of Southeast Alaska, from Yakutat to Ketchikan.

11. Lynn Canal Conservation, Inc. is a non-profit, volunteer grassroots conservation organization founded in 1971, based in Haines, Alaska. It has approximately 150 members, all of whom reside in Southeast Alaska. Lynn Canal Conservation works to protect the environment of the Lynn Canal area, including the Berners Bay area.

12. Plaintiffs participated actively in the administrative processes leading up to the various approvals for the Kensington Gold Project. Plaintiffs submitted comments on draft permits, proposed actions, and draft, final, and supplemental EISs for the project. Plaintiffs exhausted the administrative remedies for the decision challenged in this Complaint.

13. Members of plaintiff organizations reside near, visit, or otherwise use and enjoy areas that will be affected by the Kensington mine project, including Berners Bay and Lower Slate Lake. In particular, members of plaintiff organizations use these areas for swimming, fishing, hunting, wildlife viewing, photography and education, and aesthetic and spiritual enjoyment. Plaintiffs and their members derive recreational, aesthetic, and conservation benefits and enjoyment from these areas. The construction and operation of the proposed gold mine will directly and irreparably injure these interests.

DEFENDANTS

14. Defendant United States Army Corps of Engineers is an agency of the United States. It is charged, among other things, with issuing permits for the discharge of dredged or fill material under section 404 of the Clean Water Act. The Corps issued the section 404 permits challenged here.

15. Defendant Colonel Timothy J. Gallagher is the District Engineer for the Alaska District office of the United States Army Corps of Engineers in Anchorage, Alaska. The District office is responsible for issuing permits for the discharges of dredged or fill material in Alaska under section 404 of the Clean Water Act. Defendant Gallagher signed the Corps' Revised Record of Decision, the section 404 permits challenged here, and the letters reinstating those permits.

16. Defendant Larry L. Reeder is the Chief of the Regulatory Branch in the Alaska District office of the United States Army Corps of Engineers in Anchorage, Alaska. He is responsible for issuing permits for the discharge of dredged or fill material in Alaska under section 404 of the Clean Water Act, and he signed the section 404 permits challenged here.

17. Defendant Dominic Izzo is the Principal Deputy Assistant Secretary of the Army (Civil Works). On May 2, 2002, he signed the Corps' new regulations covering the definitions of "fill material" and "discharge of fill material" on which the Corps relied in issuing the Kensington permit challenged here.

18. The full name of Defendant United States Forest Service is United States Department of Agriculture, Forest Service. It is an agency of the Department of Agriculture entrusted with the ad-

ministration of the national forests, including the Tongass National Forest. It regulates mining claimants' use of national forest lands, and it approved the plan of operations for the Kensington gold mine, including the use of Lower Slate Lake for the disposal of mine tailings, within the Tongass National Forest.

FACTS

19. This project dates back to 1989 when Coeur Alaska first proposed the development of the Kensington mine. Coeur Alaska made that proposal as a joint venture with Echo Bay Exploration, Inc.

20. On June 1, 1991, the Forest Service released a draft environmental impact statement (DEIS) for the project. On January 29, 1992, the Forest Service released the final environmental impact statement (FEIS) and signed the Record of Decision (ROD).

21. At that time, Coeur Alaska claimed that the Kensington gold ore reserves included approximately 2,000,000 ounces of gold. Accordingly, the Forest Service's 1992 ROD authorized Coeur Alaska to mine approximately 200,000 ounces of gold per year for 10-12 years.

22. Under the 1992 plan, Coeur Alaska would have produced 26 million tons of mine tailings, 25% of which would have been backfilled. The rest of the mine tailings would have been disposed of in Sherman Creek, a creek that feeds into Lynn Canal.

23. Coeur Alaska intended to construct a dam in Sherman Creek in order to create a "waste disposal facility" for its mine tailings, which would have had the capacity to store 30 million tons of tailings.

24. Coeur Alaska, however, did not receive any permits from the Corps or the United States Envi-

ronmental Protection Agency (EPA). EPA believed the Corps should regulate the construction of the dam and, in so doing, consider the impacts of both the dam and the disposal of the mine tailings. The Corps believed that it lacked both the expertise and jurisdiction to regulate the discharge of mine tailings into a waterway. Neither the Corps nor EPA contemplated regulating the mine tailings as "fill material."

25. Corps Headquarters and EPA Headquarters met to resolve their disagreement. According to the resulting EPA guidance, the Corps would issue a section 404 permit for the construction of a dam in Sherman Creek. After the installation of the dam, the impounded waters would no longer be considered jurisdictional "waters of the United States" under the Clean Water Act and, as a result, neither agency would regulate the direct discharges of pollutants into the impounded waters. Instead, the Corps would consider the impacts from the disposal of the mine tailings in connection with its analysis in issuing the section 404 permit for the dam. EPA would regulate discharges from the impounded area into the creek below the dam pursuant to section 402 of the Clean Water Act.

26. Despite this guidance, neither the Corps nor EPA issued a permit for the project.

27. In 1995, Coeur Alaska bought out Echo Bay Exploration's interest in the Kensington Gold Project and became the sole operator.

28. In 1996, Coeur Alaska submitted a revised, amended plan of operations. In this version, Coeur Alaska made two significant changes. First, it would not use on-site cyanidation but would send the ore concentrate off-site for final processing. Second,

Coeur Alaska proposed to dispose its mine tailings by thickening them to approximately 55% solids and then discharging them in a wetland area between Sweeny and Sherman Creeks. The agencies referred to this proposal as a "dry tailings facility."

29. Under the 1996 Amended Plan of Operations, Coeur Alaska would provide on-site, temporary housing for its employees during the life of the mine.

30. On February 18, 1997, the Forest Service released a draft supplemental environmental impact statement (DSEIS). On August 1, 1997, the Forest Service issued a final supplemental environmental impact statement (FSEIS) and ROD for the 1996 Amended Plan of Operations.

31. On January 28, 1998, the Corps issued Coeur Alaska a permit pursuant to section 404 of the Clean Water Act for the construction of the dry tailings facility. On April 14, 1998, EPA issued Coeur Alaska a permit pursuant to section 402 to discharge runoff and leachate from the facility.

32. Despite having received its permit approvals, Coeur Alaska decided not to proceed with the project but, instead, reviewed other ways to cut project costs.

33. In November 2001, Coeur Alaska submitted another amended plan of operations to the Forest Service. Once again, Coeur Alaska substantially modified its proposal, Coeur Alaska proposed to mine a much smaller, higher-grade ore body than it would have done under its 1996 Amended Plan of Operations. It would produce about 100,000 ounces of gold per year for 10 years instead of about 200,000 ounces of gold per year for 10 years.

34. Coeur Alaska would produce 7.5 million tons of mine tailings, instead of 26 million tons. Coeur

Alaska proposed to backfill up to 40% of its tailings (3 million tons) and discharge the remaining 4.5 million tons into Lower Slate Lake, a freshwater alpine lake that feeds into Slate Creek.

35. Specifically, Coeur Alaska proposed to construct a 90-foot tall by 500-foot long dam below the lake to enlarge it and then discharge the tailings via a 3.5-mile pipeline from its milling facility directly into the lake.

36. Under the 2001 Amended Plan of Operations, Coeur Alaska will not provide on-site employee housing. Instead, it will transport its employees via ferry. To do this, Coeur Alaska will construct marine terminals at Cascade Point and Slate Creek Cove, and the shuttle vessel will make three to five round-trips per day during the week and three round-trips per day during weekends.

37. On January 23, 2004, the Forest Service released another DSEIS. On December 23, 2004, the Forest Service released a FSEIS and a third ROD. In the 2004 FSEIS, Alternative A, the no-action alternative, is the approved alternative from the 1997 FSEIS, i.e., using the "dry tailings facility" and providing on-site employee housing. Alternative A1 is similar to Alternative A except that it involves mining under the reduced rate of Coeur Alaska's current proposal and therefore results in fewer impacts. Alternative D, the alternative selected in the 2004 FSEIS, involves mining at the reduced rate, discharging the processed waste or tailings into Lower Slate Lake, and shuttling the mine workers back and forth every day between Cascade Point and Slate Creek Cove.

38. At the time the Forest Service released the 2004 DSEIS, EPA and the Corps were discussing

how they would regulate the disposal of the mine tailings. They considered following the procedure that they had outlined in 1992, i.e., redefining the lake as a "waste treatment facility" and not regulating the direct discharge of tailings into Lower Slate Lake. They also considered for the first time labeling the mine tailings "fill material" based on rule changes, promulgated by the Corps and EPA in 2002, that amended the definitions of "fill material" and "discharge of fill material." Under that approach, the Corps would regulate the direct discharge of mine tailings at the end of the pipe into the lake.

39. In May 2004, the agencies decided that the mine tailings should be deemed "fill material," and the Corps would regulate Coeur Alaska's discharge of the processed mine waste from the milling facility into Lower Slate Lake pursuant to section 404 of the Clean Water Act. EPA would regulate the discharges from Lower Slate Lake into waters below the lake pursuant to section 402 of the Act.

40. On June 17, 2005, the Corps signed the section 404 permit allowing Coeur Alaska to discharge its mine tailings into Lower Slate Lake.

41. On June 29, 2005, EPA issued a section 402 permit to Coeur Alaska for the discharges from Lower Slate Lake into the East Fork of Slate Creek Cove.

42. On July 15, 2005, the Corps issued a section 404 permit to Goldbelt, Inc., the owner of lands at Cascade Point, for the construction of a marine terminal facility there. The sole purpose of this facility is to provide a shuttle service for the Kensington mine.

43. Plaintiffs filed their initial Complaint on September 12, 2005. Shortly thereafter, the Corps decided to suspend both section 404 permits and re-evaluate its decision. On November 29, 2005, the Corps formally suspended the permits. On March 29, 2006, the Corps rendered a revised Record of Decision and reinstated the original permits. Coeur Alaska's section 404 permit for the disposal of mine tailings remained the same. The Corps slightly modified the section 404 permit for the Cascade Point marine facility to make clear that the permit is dependent on the proposed plan of operations for the Kensington mine.

44. Pursuant to its section 404 permit, Coeur Alaska proposes to discharge, on average, 210,000 gallons of mine tailings per day into Lower Slate Lake, totaling about 4.5 million tons over 10 years. The tailings discharge into the lake is projected to have a concentration of about 550,000 milligrams per liter of total suspended solids and pH between 10 and 11.

45. The tailings discharges will likely kill all fish and invertebrates in Lower Slate Lake.

46. Coeur Alaska and Defendants have not established that fish and other aquatic life will be able to re-populate Lower Slate Lake after Coeur Alaska stops discharging its mine waste into the lake. Coeur Alaska conducted two freshwater sediment toxicity tests on freshwater benthic invertebrates using samples of tailings generated from Kensington ore. One of those tests revealed a statistically significant drop in survival rate for the test organism. In other words, the tailings killed the organism.

47. Coeur Alaska failed to preserve any more samples of tailings to conduct further habitability tests on freshwater organisms.

COUNT I

(Clean Water Act)

48. Plaintiffs repeat and incorporate by reference the allegations of the preceding paragraphs.

49. The purpose of the Clean Water Act is "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

50. To further these goals, section 301(a) of the Clean Water Act prohibits "the discharge of any pollutant by any person" unless done in compliance with the Act, such as pursuant to a permit issued under section 402 or 404. 33 U.S.C. § 1311(a).

51. Section 402 of the Act established the National Pollutant Elimination Discharge System (NPDES) permit program. 33 U.S.C. § 1342. These permits contain specific terms and conditions, as well as numerical discharge limits, which govern the activities of pollutant dischargers.

52. Congress directed EPA to promulgate effluent limitations for point source discharges of pollutants. 33 U.S.C. § 1311(b). Congress also directed EPA to identify categories of point sources and promulgate national standards of performance for new sources within each category. 33 U.S.C. § 1316(b)(1).

53. An effluent limitation "means any restriction established by a State or [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, . . . including

schedules of compliance." 33 U.S.C. § 1362(11). A standard of performance is "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which [EPA] determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants." 33 U.S.C. § 1316(a)(1). Since standards of performance reduce or eliminate quantities, rates, or concentrations of pollutants, they constitute effluent limitations.

54. Section 404 of the Clean Water Act authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a).

55. Between 1977 and 2002, EPA and the Corps had different definitions for "fill material" and similar definitions for "discharge of fill material." In 2002, the agencies promulgated new regulations amending those definitions and making them identical. Under the new regulations, "fill material means material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1).

56. In enacting this regulation, however, the Corps made clear that it was not changing existing regulatory practice. Under the agencies' long-standing practice, point source discharges for which EPA had promulgated effluent limitations are not "fill material." Instead, those discharges are subject to regulation under section 402 and must comply

with EPA's effluent limitations at the end of the pipe.

57. On December 3, 1982, EPA promulgated national standards of performance for new gold mines with mills that use a froth-flotation process to separate the gold minerals from the rock. 47 Fed. Reg. 54,598 (Dec. 3, 1982).

58. The standard of performance for mines proposed after 1982 prohibits the discharge of process wastewater to navigable waters except where net precipitation exceeds net evaporation, in which case the difference between the two can be discharged, and where there is a buildup of contaminants that significantly interferes with the ore recovery process, in which case a discharge can occur to correct the interference problem. 40 C.F.R. § 440.104(b).

59. The milling process for the Kensington gold mine will use a froth-flotation process for the beneficiation of gold.

60. Coeur Alaska constitutes a "person" under the Act. 33 U.S.C. § 1362(5).

61. The mine tailings generated by the milling process in this project constitute a "pollutant" under the Act, which includes industrial waste. 33 U.S.C. § 1362(6).

62. The 3.5-mile pipeline leading from the milling facility to Lower Slate Lake is a discernible, confined and discrete conveyance and therefore a "point source" under the Act. 33 U.S.C. § 1362(14).

63. Lower Slate Lake constitutes "navigable waters" under the Act. 33 U.S.C. § 1362(7).

64. Coeur Alaska's proposed daily discharges of 210,000 gallons of mine tailings thus constitutes a

point source discharge of pollutants. Those discharges are subject to the national standard of performance that EPA promulgated in 1982 for discharges from froth-flotation gold mills at the end of the pipe into Lower Slate Lake. 40 C.F.R. § 440.104.

65. Congress directed that the effluent limitations established by EPA "shall be applied to all point sources of discharge of pollutants in accordance with the provisions of' the Act. 33 U.S.C. § 1311(e).

66. Congress also provided that "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e).

67. Although EPA has promulgated a national standard of performance for the proposed discharge from Coeur Alaska's milling facility, neither EPA nor the Corps is going to apply that standard to the discharge of pollutants at the end of the pipe.

68. Instead, the Corps has authorized the direct point source discharge of processed mine waste into Lower Slate Lake pursuant to section 404 of the Act on the ground that such waste is "fill material."

69. When the Corps and EPA implemented their new regulations defining "fill material" and the "discharge of fill material," 33 C.F.R. § 323.2, they stated that pollutants for which EPA has promulgated effluent limitations do not constitute "fill material" even if their discharge has the effect of fill.

70. Therefore, the Corps' attempt to regulate the point source discharge of pollutants for which EPA has promulgated effluent limitations circumvents the purpose of the Clean Water Act, violates the requirements of sections 301(e) and 306(e), 33 U.S.C.

§§ 1311(e) & 1316(e), violates the Corps' and EPA's respective regulations, and is inconsistent the Corps' and EPA's long-standing regulatory practice.

71. The Corps' decision to issue a section 404 permit for the discharges of processed mine waste from the milling facility directly into Lower Slate Lake is therefore arbitrary, capricious, and not in accordance with law.

72. To the extent that the regulations defining "fill material" and the "discharge of fill material," 33 C.F.R. § 323.2, are interpreted to authorize the proposed discharges of processed mine waste from the milling facility directly into Lower Slate Lake, the regulations and the section 404 permit issued under them are inconsistent with the Clean Water Act and therefore arbitrary, capricious, and not in accordance with law.

73. The Forest Service is directed to manage the various resources of the national forests, including watersheds and fish, for multiple use in a manner that best meets the needs of the American people and will not impair the productivity of the land. 16 U.S.C. §§ 528-31, 551, 1600-14.

74. The plan of operations the Forest Service approved for the Kensington mine includes the discharge of processed mine waste directly into Lower Slate Lake, contrary to the Clean Water Act. The Forest Service's approval is therefore arbitrary, capricious, and not in accordance with law.

75. The Corps' section 404 permit for the construction of a marine terminal facility at Cascade Point is intended solely to facilitate the operations at Kensington mine and is dependent on the proposed plan of operations. The Corps' decision to reinstate this

permit, as modified, is therefore arbitrary, capricious, and not in accordance with the law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that the Corps' section 404 permit for the discharge of processed mine waste for which. EPA has promulgated effluent limitations is inconsistent with the Clean Water Act and unlawful;

2. Enter a declaratory judgment that the plan of operations approved by the Forest Service is inconsistent with the Clean Water Act and unlawful;

3. Enter a declaratory judgment that the Corps' section 404 permit for the construction of a marine terminal facility at Cascade Point is inconsistent with the Clean Water Act and unlawful;

4. Set aside the section 404 permit the Corps issued to Coeur Alaska for the discharge of mine tailings into Lower Slate Lake, the Forest Service's plan of operations, and the section 404 permit the Corps issued to Goldbelt, Inc. for the construction of a marine terminal facility at Cascade Point;

5. Enter appropriate injunctive relief;

6. Award plaintiffs the costs of this action, including reasonable attorneys' fees; and

7. Grant such other relief as this Court deems just and proper.

Respectfully submitted this 4th day of April 2006,

/s/ Demian A. Schane

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APPENDIX U

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION COUNCIL; SIERRA CLUB; and LYNN CANAL CONSERVATION,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL TIMOTHY J. GALLAGHER, in his official capacity as District Engineer; LARRY L. REEDER, in his official capacity as Chief of the Regulatory Branch; JOHN C. LEEDS, III, in his capacity as manager of the Juneau Field Office; GLEN E. JUSTIS, in his capacity as Chief of the East Section; DOMINIC IZZO, in his official capacity as Prin-

No. 1:05-cv-00012-JKS

MEMORANDUM DECISION

[Re: Motions at Dockets 41 and 80]

cipal Deputy Assistant Secretary of the Army (Civil Works); and UNITED STATES FOREST SERVICE,

Defendants,

and

COEUR ALASKA, INC.; STATE OF ALASKA; and GOLDBELT, INC.,

Defendant-Interveners.

I. PROCEEDINGS

Plaintiffs Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation appeal the decision of the U.S. Army Corps of Engineers ("Corps") decision to grant permits to Coeur Alaska, Inc. and Goldbelt, Inc, under § 404 of the Clean Water Act ("CWA").[1] Plaintiffs seek to vacate the § 404 permits, Record of Decision and plan of operations, and permanently enjoin the Corps and Forest Service from allowing any activities authorized by the vacated permits, ROD, and plan of operations. At Docket No. 41 Plaintiffs have moved for summary judgment. At Docket No. 80 the Federal Defendants have opposed the motion and cross-

[1] 33 U.S.C. § 1344.

moved for summary judgment in their favor.[2] At Docket Nos. 61, 67, and 71, respectively, Interveners Goldbelt, Inc., State of Alaska, and Coeur Alaska, Inc. have filed oppositions to Plaintiffs' motion. City and Borough of Juneau and Berners Bay Consortium have filed amici briefs in opposition to Plaintiffs' Motion at Docket Nos. 88 and 92, respectively. At Docket No. 97 Southeast Conference has filed an amicus brief in support of the Plaintiffs' motion. Plaintiffs have replied to the opposition.

At Docket Nos. 83 and 86 Intervener Coeur Alaska and the Federal Defendants have requested oral argument. The Court having reviewed the moving papers, oppositions, and amici briefs has determined that oral argument would not assist the court in deciding the motions. The requests for oral argument are DENIED.

II. BACKGROUND[3]

The permit granted Coeur Alaska allows it, as the operator of the Kensington Mine, to discharge approximately 210,000 gallons per day of tailings remaining after gold ore is processed using the "froth-flotation process" as "fill material" directly into Lower Slate Lake. The lake will be utilized as a storage facility impounding the tailings.[4]

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[2] For convenience, the named defendants are referred to collectively as "Federal Defendants."

[3] The background and history of this case are well known to the parties and, in the interests of brevity, will not be replicated here except as necessary to an understanding of the Court's decision.

[4] Agency Record ("AR"), Vol. 8, 003328.

After the ore is extracted from the ground, it will be processed through crushing, grinding, flotation, thickening and filtration.[5] After the ore is crushed and ground, it is fed to the flotation tanks in slurry form, where air, conditioners and frothing agents will be added to cause the gold-bearing minerals to attach to air bubbles at the top of the tank.[6] The gold-bearing froth is then skimmed off and further concentrated in additional flotation tanks.[7] Most of the chemicals added to the system will stay in the flotation tanks or be removed with the flotation concentrate, not discharged with the tailings. [8] Similarly, most of the other metals will be removed from the system along with the gold concentrate, not discharged with the tailings.[9] Following the final flotation, the ore concentrate is dewatered and placed in specialized, sealed marine transport containers for shipment to a facility outside Southeast Alaska for further processing.[10] No cyanide processing will take place at the Kensington Mine or elsewhere in Southeast Alaska.[11]

"Tailings" are the solid material left in the bottom of the flotation tanks after the gold-bearing

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5 AR Vol. 8, 003360–61; *see also* Vol. 1, 000021.

6 AR Vol. 8, 003360–61.

7 *Id.*

8 *Id.*

9 *Id.*; *see also* AR Vol. 1, 000005.

10 AR Vol. 1, 000005; Vol. 8, 003360–61.

11 AR Vol. 1, 000005, 000021.

material has been removed.[12] Using "high-grade" mine operations, approximately 40% of the tailings should be backfilled to the mine, leaving approximately 4.5 million tons of tailings to be discharged into the Lower Slate Lake impoundment.[13] The tailings will be combined with liquid in a slurry and transported through a 3.5 mile, double-walled, high-density polyethylene pipeline approximately 6 inches in diameter to the lake impoundment.[14] The solid component of the slurry (*i.e.*, the tailings) will comprise approximately 55% of the slurry. Before the tailings slurry leave the mill, a polymer and flocculant will be added to agglomerate the smaller tailings and enhance settling of the tailings once they are deposited into the lake impoundment.[15] The tailings slurry is to be discharged from the bottom of the submerged pipe and through perforations in that pipe, which will be moved periodically to ensure equal distribution of the tailings.[16] The tailings will be placed at a depth that would prevent remobilization of the tailings.[17] Upon closure of the mine, the tailings will fill the lake to its current ordinary high water mark, thus reaching a depth of approximately

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12 AR Vol. 8, 003362.

13 AR Vol. 1, 000007; Vol. 8, 003358, 003362, 003367.

14 AR Vol. 8, 003364.

15 *Id.* The added materials are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the settling of the fine material.

16 *Id.*

17 AR Vol. 1, 000022.

50 feet.[18] At that time, the lake will have grown to approximately 62 acres from its current size of 23 acres, and will be approximately 33 feet deep over the top of the tailings.[19] The discharge of tailings to the lake impoundment is limited to the pre-specified volume of 4.5 million tons.[20] The tailings must also be tested quarterly to ensure that there are no significant deviations from the original tailings analysis that might affect monitoring, closure requirements, water quality or any other permit condition.[21]

It is anticipated that most aquatic life in Lower Slate Lake will be lost during mining operations, primarily due to being covered with the discharged material.[22] Tests on the tailings show that they will not generate an acid discharge or metals leachate.[23] While the pH around the discharge pipe is expected to be toxic to the aquatic environment, it is anticipated this will dissipate very rapidly.[24] Reclamation of the 62-acre lake, including capping of the tailings,

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18 AR Vol. 1, 000013; Vol. 8, 003453.

19 AR Vol. 1, 000013. The increased lake area at closure is expected to consist of approximately 47 acres of deep-water habitat and 15 acres of shallow-water habitat. The 15 acres of shallow-water habitat is expected to convert over time to wetlands or vegetated shallows.

20 *See* AR Vol. 1, 000068; Vol. 13, 006285.

21 AR Vol. 1, 000022, 000067–68.

22 AR Vol. 1, 000021–22; Vol. 8, 003575.

23 AR Vol. 1, 000030.

24 AR Vol. 1, 000022.

is required as part of the project.[25] As a result, it is expected that the lake would recover over time, and would provide at least equivalent aquatic habitat and productivity as it does currently.[26] This includes habitat for Dolly Varden char and other aquatic organisms.[27]

Mid-Lake East Fork Slate Creek, an upstream tributary of Lower Slate Lake, will be diverted around the lake impoundment by a pipeline.[28] Further, a "reverse osmosis" water treatment system will be constructed to remove solids and metals from the lake impoundment water before any of that water is allowed to enter downstream waters.[29] The treated water will be transported from the treatment plant to the diversion pipeline, and then flow via a spillway to East Fork Slate Creek, downstream of the lake, eventually joining Slate Creek and entering Berners Bay.[30] Discharges of the treated water from Lower Slate Lake are subject to a CWA § 402

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25 AR Vol. 1, 000013, 000015, 000022–23. A reclamation bond on the operation is being held to ensure that the lake is reclaimed in accordance with the approved plans. *See* AR Vol. 1, 000005.

26 AR Vol. 1, 000022–23; Vol. 8, 003573–76.

27 AR Vol. 1, 000022–23, 000069; Vol. 8, 003573–76.

28 AR Vol. 8, 003367.

29 AR Vol. 1, 000015; Vol. 8, 003367.

30 *Id.*

NPDES permit and must meet state water quality standards.[31]

The overall impact of the project permitted by the Corps and EPA is to convert Lower Slate Lake into a temporary settling pond for the disposal and treatment of the tailings generated by the mining operations at the Kensington Mine. Broadly stated, the project entails; (1) isolating Lower Slate Lake from the rest of the drainage system, (2) using the lake as a tailing storage facility impounding the tailings, and (3) restricting the release of water into the downstream drainage system to that which meets the requirements of § 402. The adverse impact, primarily the destruction of aquatic life, is expected to be limited to Lower Slate Lake. At the termination of the mining operations, restoration of the lake as an aquatic resource is expected to occur.

III. ISSUES

Plaintiffs contend that the permitting process involved in this case was governed by the more stringent requirements of § 402 of the CWA,[32] not § 404. At the heart of the controversy are the regulations defining "fill material." The Environmental

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[31] AR Vol. 1, 000005. The State agreed in its CWA § 401 certification that the water discharged from the tailings disposal facility (Lower Slate Lake) to East Fork Slate Creek, which was permitted under a CWA § 402 NPDES permit, would meet state water quality standards. AR Vol. 2, 001101. Plaintiffs do not challenge the issuance of this permit.

[32] 33 U.S.C. § 1342.

Protection Agency ("EPA") and the Corps use the same definition.[33]

> (e) (1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

Also relevant is the definition of "discharge of fill material," defined as:[34]

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[33] 33 C.F.R. § 323.2(e) (Corps); 40 C.F.R. § 232.2 (EPA). [Note: The quoted provision is the Corps' regulation; the definition in the EPA regulations is identical except that the definitions are not set forth in separate subdivisions.]

[34] 33 C.F.R. § 323.2(f) (Corps); 40 C.F.R. § 232.2 (EPA) (emphasis added).

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; *placement of overburden, slurry, or tailings or similar mining-related materials*; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See §323.4 for the definition of these terms). See §323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

Plaintiffs contends that either: (1) in issuing the permit, the Corps misapplied the regulations; or (2) if the regulations were properly applied, the regulations are invalid as contrary to the CWA.[35] The real crux of the question before this Court is: Under § 404, may the Corps authorize the use of waters of the United States as a settling pond? For the reasons stated below, the Court holds that it may.

IV. STANDARD OF REVIEW

This Court in reviewing an agency decision may set it aside if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] It is self-evident that an agency decision based upon an invalid regulation or the misapplication of a regulation is "otherwise not in accordance with law."[37]

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[35] The Court notes that Plaintiffs also challenges the granting of the permit on the grounds that it does not meet the requirements of the several sections of the CWA, *e.g.*, §§ 306(e) and 311(e). This argument must be rejected. If the permit was properly issued under § 404, those provisions of the CWA are inapplicable. The applicable standard to be applied are the guidelines promulgated by the EPA based on criteria specified in 33 U.S.C. § 1343(c). *See also* 33 C.F.R. 323.6(a). If the permit was not properly issued under § 404 it is invalid in any event and the argument of Plaintiffs moot.

[36] 5 U.S.C. § 706(2)(A).

[37] *See, e.g., Regents of the Univ. of California v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985) (invalid regulation), *overruled on other grounds by Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993); *Alaskan Trojan P'ship v.*

[Footnote continued on next page]

In determining the validity of agency regulations, this Court must apply the rule established by the U.S. Supreme Court in *Chevron*.[38]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.* * * * [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The Supreme Court has, however, placed a limitation on the application of *Chevron*.[39]

> Deference in accordance with *Chevron*, however, is warranted only when it appears that Congress delegated au-

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Gutierrez, 425 F.3d 620, 627–628 (9th Cir. 2005) (agency interpretation of its own regulations)

[38] *Chevron v. NRDC*, 467 U.S. 837, 842–843 (1984) (footnote omitted)

[39] *Gonzales v. Oregon*, 546 U.S. ___, ___, 126 S. Ct. 904, 914–915 (2006) (citations and internal quotation marks omitted).

> thority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Otherwise, the interpretation is entitled to respect only to the extent it has the power to persuade.

When reviewing the interpretation of agency regulations, courts must give substantial deference to an agency's interpretation of its own regulations. [40] This Court "must defer to the [Administrator's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the [Administrator's] intent at the time of the regulation's promulgation."[41]

IV. DISCUSSION

The CWA divides the permitting process into two segments. In general, permitting for the discharge of

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[40] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted).

[41] *Id.* (internal quotation marks and citation omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (citations and internal quotation marks omitted); *Wards Cove Packing Co. v. NMFS*, 307 F.3d 1214, 1218 (9th Cir. 2002) ("An agency's interpretation of regulations it is charged with administering is entitled to a high degree of deference and will be upheld as long as it is not plainly erroneous or inconsistent with the regulation.") (citations omitted).

effluents is vested in the EPA, the granting of which must meet strict standards.[42] Congress has, however, carved out an exception, vesting primary permitting authority in the Corps for the disposal of "dredged or fill material" into navigable waters at specified disposal sites.[43] The standards to be applied for the issuance of these permits is determined in accordance with guidelines developed by the EPA in conjunction with the Corps, and are significantly less stringent.[44]

Turning first to the issue of the validity of the regulation. Congress has clearly and unequivocally delegated authority to the EPA to issue regulations necessary to carry out its functions under the CWA.[45] As noted above, one of the functions of the EPA is to develop guidelines, in conjunction with the Corps, for use in guiding the Corps in processing permits under § 404.[46] In the case at bar, it is undisputed that Congress has not defined the term "fill material," thereby leaving its definition to the EPA, which the EPA did using the rule-making process of the Administrative Procedures Act. Accordingly, this

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[42] 33 U.S.C. § 1342(a).

[43] 33 U.S.C. § 1344(a).

[44] 33 U.S.C. §§ 1344(b)(1), 1343(c). The guidelines are promulgated in 33 C.F.R. Part 230. Plaintiffs do not contends that the permit issued to Coeur Alaska does not meet these guidelines.

[45] 33 U.S.C. § 1361(a) ("the Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.").

[46] 33 U.S.C. § 1344(b)(1).

Court must give Chevron-type deference to the EPA's definition of "fill material" and "discharge of fill material."[47]

Plaintiffs argue that the regulations are invalid because they do not comply with the "expressed intent of Congress." Specifically, that because they do not comply with standards promulgated by the EPA, they are contrary to § 306(e) of the CWA.[48] Plaintiffs' argument on this point is not persuasive. Plaintiffs do not specify which standard of performance is violated by these regulations, which simply define what constitutes fill material within the scope of § 404. This Court cannot say that the definition of fill material contained in the regulations promulgated by the EPA and Corps is not a permissible construction of the statute. the Agency could reasonably conclude that its definition is consistent with the distinction Congress sought to make between § 402 and § 404.

Turning to the interpretation of the regulation and its application in this case. First, the Court notes that it is uncontested that the slurry to be discharged into Lower Slate Lake will "change the bottom elevation" of the lake. Thus, it at least facially falls within the definition of "fill material" contained in the regulations. Plaintiffs do not dispute

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47 *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 316 F.3d 916, 921 (9th Cir. 2003).

48 33 U.S.C. § 1316(c) ("After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.").

this. Plaintiffs argue that the inclusion of mine tailings within the definition of "fill material" is contrary to the agencies' intent at the time the regulations were promulgated. Plaintiffs' argument is essentially predicated upon the point that at the time the regulations were amended in 2002, the statement accompanying the notice of adoption of the final rule made clear that there was no intent to include mine tailings as "fill material" or "discharge of fill material."[49] The provisions cited by Plaintiffs taken alone and in isolation would support a finding of a clear indication by the EPA and Corps that the interpretation advanced by Plaintiffs is correct. However, Plaintiffs overlook or ignore other statements included in the adoption statement that contradict Plaintiffs' position. Specifically:

> Today's final rule also includes several clarifying changes to the term "discharge of fill material." Specifically, the term "infrastructure" has been added in several places following the term "structure" to further define the situations where the placement of fill material is considered a "discharge of fill material." In addition, the phrases "placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills" and "*placement of overburden, slurry, or tailings or similar mining-related materials*" have been

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[49] Quoting various excerpts from 67 Fed. Reg. 31,129 – 31,143 (May 9, 2002).

> added to the definition of "discharge of fill material" *to provide further clarification of the types of activities regulated under section 404.*[50]

and,

> *The language in today's final rule will clarify that any mining-related material that has the effect of fill when discharged will be regulated as "fill material."* We made this clarification because it was clear from the comments that some were reading the examples we identified as an exclusive list. The general intent of this rule is to cover materials that have the effect of fill, not simply to focus on any one industrial activity. We believe that the additional mining related examples will address the confusion reflected in the comments. Finally, as discussed in section II.B.1.c of this preamble, we do not agree that the CWA contains a blanket prohibition precluding discharges of "waste" materials in to waters of the U.S. Instead, the Act establishes the framework for regulating discharges into waters and we believe the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials.[51]

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[50] *Id.*, 31,130 (emphasis added).

[51] *Id.*, 31,135 (emphasis added).

Contrary to the arguments of Plaintiffs, the interpretation of the regulations in this case is not contrary to the intent of the EPA Administrator at the time she adopted the regulations in question. While Plaintiffs may offer another plausible interpretation of the regulations in question, that interpretation is not the only reasonable interpretation of the regulation and does not compel this court to strike down the Corps' different interpretation.[52] Congress has deemed it appropriate to delegate to the Administrator of Environmental Protection Agency and the Secretary of the Army to coordinate their respective jurisdictions under the Clean Water Act. This they have done by duly adopted regulations to which this Court must defer. The Corps properly issued the permit to Coeur Alaska, Inc. under § 404 of the Clean Water Act.

Plaintiffs also seek to set aside the permit issued to Goldbelt, Inc. to construct a marine terminal facility. As a basis for this action, Plaintiffs rely on the assumption that Coeur Alaska's § 404 permit will be revoked and, therefore, the need for the marine terminal facility becomes moot. As the Court has held that the permit to Coeur Alaska was properly issued, there is no basis for granting the relief requested as to Goldbelt, Inc. The same rationale applies to the ROD issued by the Forest Service.

VI. CONCLUSION/ORDER

Based upon the foregoing, Plaintiffs' Motion for Summary Judgment at Docket No. 41 is **DENIED**;

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[52] *Akootchook v. United States*, 271 F.3d 1160, 1167 (9th Cir. 2001).

and the Cross-Motion for Summary Judgment filed by the Federal Defendants at Docket No. 80 is **GRANTED**.

IT IS HEREBY ORDERED THAT the complaint be, and it hereby is, **DISMISSED**, with prejudice.

The Clerk of the Court to enter judgment accordingly.

Dated at Anchorage, Alaska, this 3rd day of August 2006.

s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

APPENDIX V

DECLARATION OF RANDY WANAMAKER

RANDY WANAMAKER declares under penalty of perjury as follows:

1. My name is Randy Wanamaker. I reside at 3814 Killewich Drive, Juneau, Alaska, 99801. I am making this declaration based on my personal knowledge of all the facts recited below and in opposition to Appellants' Emergency Motion Under Circuit Rule 27-3 for an injunction pending appeal of the decision of the United States District Court for the District of Alaska dismissing their complaint in *Southeast Alaska Conservation Council, et al. v. United States Army Corps of Engineers*. This Declaration supplements my attached Declaration of May 3, 2006 (Attachment 1), which was submitted to the District Court as an attachment to the Amicus Curiae brief of the Southeast Conference.

2. I am a Tlingit Indian. I am a shareholder in Intervenor/Appellee Goldbelt, Inc. ("Goldbelt"), the Native Urban Corporation formed pursuant to the Alaska Native Claims Settlement Act ("ANCSA") to receive and administer lands and other benefits on behalf of the Tlingit Indians residing in or having historical ties to the Juneau area, including Berners Bay where the Kensington Mine is located. Because of the critical importance of the Kensington Gold Project to the economic future of Goldbelt and its shareholders, as discussed in greater detail below,

Goldbelt has joined with the federal defendants, Coeur Alaska, Inc. ("Coeur"), and the State of Alaska ("Alaska") as intervenors in opposition to plaintiffs' efforts to kill the Kensington Gold Project.

3. I have been active in the affairs of Goldbelt in general, and specifically in their efforts to develop Goldbelt's lands in the Echo Cove/Cascade Point area, since 1993. From 1993 to 2001, and from 2003 to present I have served as a director of Goldbelt. From 2001 to 2003 I served as Chairman of the Board of Directors of Goldbe

4. I am a Certified Professional Geologist and Registered Environmental Assessor. From 1980 to 1990 I served as the Subsurface Resource Manager for Sealaska Corporation supporting and advising Goldbelt in regards to geologic and environmental issues.

5. I have carefully reviewed the attached Declaration of Joe Kahklen dated October 12, 2005 (Attachment 2), and submitted to the District Court in support of Goldbelt's motions for leave to participate in the litigation as an intervenor/defendant and in opposition to plaintiffs' motion for summary judgment. The statements made Chairman Kahklen are true to my own personal knowledge.

6. Since 2001 I have served as an elected member of the Assembly of the City and Borough of Juneau ("CBJ") Assembly. I currently serve as Deputy Mayor of CBJ and am personally acquainted with the overall status of economic activity in the City and Borough. Because CBJ has permitted the Kensington Gold Project, as well as Goldbelt's marine terminal at Cascade Point, and because of the critical importance of the Kensington Gold Project to the economy of Juneau and the surrounding areas,

CBJ has participated in the litigation as an amicus curiae urging the court to permit the Kensington Gold Project to go forward.

7. Both Goldbelt and CBJ are members of the Southeast Conference, a non-profit organization working to meet the transportation, energy, social welfare and economic needs of Southeast Alaska. I serve as a director of the Southeast Conference, and in that capacity I am generally familiar with depressed economic conditions throughout Southeast Alaska. Because the Kensington Gold Project is critically important to the future of Southeast Alaska, the Southeast Conference submitted an amicus curiae brief urging the court to reject the plaintiffs' challenge to the Kensington Gold Project.

8. From 1996 to 2003 I served as the coordinator of the Berners Bay Consortium ("BBC"), composed of the Native Urban/Village Corporations of Goldbelt, Kake and Klukwan, and liaison for BBC with Coeur. BBC was formed in 1996 to provide mine support services, and entered into a Memorandum of Understanding with Coeur dated January 29, 1996, discussed in greater detail below. From 2005 to the present, I have served as the Executive Director of the BBC Human Resource Development Corporation (BBCHRDC), where I am responsible for identifying, recruiting and training Alaska Natives and Alaska residents for employment at the Kensington Mine. The BBCHRDC is a joint venture owned in equal parts by Kake Tribal Corporation, Klukwan, Incorporated, Goldbelt, Incorporated and Coeur Alaska, Incorporated.

9. Because of the critical importance of the Kensington Gold Project to the Native Communities of Juneau, Kake and Klukwan (Haines), BBC also filed

an amicus curiae brief urging the Court to reject plaintiffs' claims. I have carefully considered the attached Declaration of Duff W. Mitchell (Attachment 3), and concur, based on my own personal knowledge, with his statements concerning the importance of the Kensington Gold Project to the Native communities of northern Southeast Alaska.

ISSUANCE OF AN INJUNCTION PENDING APPEAL WOULD HAVE A DEVASTATING IMPACT ON GOLDBELT

10. The site of the Kensington Mine, on Berners Bay some 40 miles north of Juneau, lies in the heart of Tlingit Indian aboriginal territory. Like my ancestors before them, many Juneau Tlingit continue to fish and hunt for subsistence purposes in the Berners Bay area.

11. Although Goldbelt is headquartered in the Juneau area, virtually all of the valuable land on the Juneau road system had already been granted to others by the time ANCSA was enacted in 1971. Consequently, Goldbelt was forced to select its land entitlement in relatively remote areas.

12. Goldbelt acquired its lands at Cascade Point on Berners Bay in 1983 as part of a Congressionally approved land exchange with the United States - after environmental groups, including Appellant Sierra Club and other plaintiffs in this litigation, sued to stop Goldbelt from exercising its rights under ANCSA to select valuable timber lands on Admiralty Island. Although the exchange was intended to appease the Sierra Club and the environmental community, and to provide Goldbelt with the quiet enjoyment of substitute lands that were then regarded as less environmentally sensitive, the

plaintiffs have continued to oppose and frustrate every effort by Goldbelt to develop these lands.

13. Over the years, Goldbelt has struggled to maintain profitability. Goldbelt's future economic well being hinges, in significant part, on its ability to develop its land at Echo Cove and Cascade Point. These lands are currently zoned by CBJ as "new growth area." Goldbelt has developed a Master Plan for this area with a focus on service to the mining, tourism and fishing industries.

14. In 1998 Appellant SEACC and others succeeded in defeating Goldbelt's application to build a dock at Cascade Point by arguing, in part, that there was no economic need for the dock at that time. SEACC also opposed Goldbelt's application for road access to the Cascade Point area for administrative purposes.

15. When Coeur revised its Plan of Operations to shift mine access to Slate Creek Cove on Berners Bay, Goldbelt renewed its applications to construct a marine terminal at Cascade Point to serve, among other purposes, as a shuttle point for mineworkers residing in Juneau. CBJ and United States Army Corps of Engineers issued permits to construct the facility, but limited its use to mine worker ferry operations.

16. Goldbelt has entered into a long-term agreement with Coeur to lease the Cascade Point marine terminal and other properties and to provide mine worker shuttle services to and from Cascade Point (including land transportation from designated parking areas in Juneau to the Cascade Point terminal). The terms of this agreement will enable Goldbelt to amortize the cost of acquiring transportation equipment and constructing the marine

terminal, and in addition to generate employment and significant profits for Goldbelt's shareholders.

17. To date, Goldbelt has invested roughly three-quarters of million dollars in its efforts to permit and construct a dock at Cascade Point. Engineering for the marine terminal (at a cost of nearly $200,000) is virtually complete, and contracts for dock and breakwater construction will be finalized in coming weeks. After years of frustration, Goldbelt is finally prepared to construct the terminal. Goldbelt can complete the dock this construction season and begin ferrying workers to the mine site by the end of the year.

18. Construction of the Cascade Point terminal is linked to continuing construction and operation of the Kensington Mine. If the Kensington project tailings facility construction is enjoined pending resolution of an appeal, the current construction season on the marine terminal also will be will be lost or abbreviated. Completion and commencement of operation of the terminal will be delayed for at least an equivalent period of time. An injunction pending appeal, would cost Goldbelt anticipated profits of $525,000 annually from operation of the terminal and provision of miner transportation services. Twelve-to-fifteen shareholder jobs would be lost. An injunction would also jeopardize the hundreds of thousands of dollars Goldbelt already has invested in permitting and developing its Berners Bay properties, and cause irreparable harm to Goldbelt's long standing efforts to make economic use of those lands.

19. In addition to the economic benefits tied to construction and operation of the marine terminal, Goldbelt and its shareholders anticipate that they will share in other economic opportunities and bene-

fits created by the Kensington Mine as described more specifically below, all of which will be lost or deferred indefinitely if the Court enters the injunction requested by the Appellants.

ISSUANCE OF AN INJUNCTION PENDING APPEAL WOULD HAVE A DEVASTATING IMPACT ON THE NATIVE COMMUNITIES OF SOUTHEAST ALASKA

20. My own observations, confirmed by a recent University of Alaska study, are that unemployment and underemployment are two-to-three times higher among Natives than the non-Native population.[1] Per capita income of Alaska Natives is about half that of non-Natives.[2] Based on my own experience, I believe that these statistics probably understate conditions in Southeast Alaska, especially in rural areas like Kake, hard hit by recent declines in timber and fishing related jobs. Many of the jobs that are available to area Natives are seasonal, low paying and do not provide benefits.

21. Through its Memorandum of Understanding with BBC, Coeur and its contractors are committed to and are achieving meaningful hiring goals for Native employees. For a number of years, for example,

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[1] G. McDiarmid, et al., "Expanding Job Opportunities for Alaska Natives" (Institute of Social and Economic Research 1998), available on line at www.iser.usa.alaska.edu/publictions/client/afnjobs/afnjobs.htm.

[2] According to the Alaska Federation of Natives in an on line publication at www.nativefederation.org/ance/purpose.php.

Coeur has been assisting in efforts to train Alaska Natives and Alaska residents for full time, high paying jobs in the mining industry. Currently the BBCHRDC - which receives approximately 60% of its funds from Coeur - operates a training program in cooperation with the University of Alaska Southeast, Central Council of Tlingit and Haida Indian Tribes of Alaska, Alaska Department of Labor, Organized Village of Kake, and various local labor organizations. At the present time, Coeur and its contractors are employing more than 300 workers, more than 70 percent of whom are Alaska residents and many of whom are Alaska Natives referred through the training programs supported by Coeur. When the activity of Native owned or affiliated companies is added to direct employment by Coeur and its principal contractors, I estimated that roughly 75 Alaska Natives have found good paying jobs in connection with Kensington Mine construction. These jobs would be lost with serious economic and social repercussions throughout the Native communities of Southeast Alaska if the Court were to grant the injunction requested by Appellants.

22. In addition to employment of individual Natives, the Coeur/BBC Memorandum of Understanding commits Coeur to bidding preferences to Consortium members and affiliated entities. Goldbelt, through a wholly owned subsidiary, is providing security at the mine site, employing six Native shareholders and generating roughly $1 million per year in gross revenues. Goldbelt also leases trucks to Coeur for $2,700 per month. These trucks would have be sold to pay bank loans if they cannot be used at the Kensington Mine site. At present, five Alaska Native owned companies or their affiliates have contracts for work at the Kensington Mine. A partial

listing of some of the benefits of this relationship is set forth in paragraph 12 of the attached Declaration of Duff W. Mitchell. This unprecedented flow of economic benefits to Juneau area Tlingit will come to an abrupt halt if the Court issues the injunction requested by the Appellants.

23. No other company, to my knowledge, has ever worked so conscientiously as Coeur to involve the Natives of northern Southeast Alaska in the planning of its activities, or been so diligent in its efforts to ensure that Alaska Natives are included in the economic benefits to be derived from its operations. An injunction pending appeal would cause enormous economic harm to many individual Natives who are employed or in training to be employed at the Kensington and to the Urban/Village Corporations that form BBC, which are benefiting or hope to benefit from mine-related contracts.

ISSUANCE OF AN INJUNCTION PENDING APPEAL WOULD HAVE A DEVASTATING IMPACT ON THE CITY AND BOROUGH OF JUNEAU AND SURROUNDING COMMUNITIES

24. The Southeast region generally has been hard hit by the loss of timber and fishing related jobs. The population of the region is declining, especially among the economically significant segment between 25 and 35 years of age. The only hope for slowing and reversing this exodus is the creation of new jobs in the private sector that pay a living wage, such as employment constructing and operating the Kensington Mine.

25. Juneau's population has leveled off, its school population (the key determinant of state funding) is declining. Real (inflation adjusted) per capita

and personal income have declined by 5% and 3% respectively since 2001.[3]

26. Juneau has suffered from the transfer of high paying government jobs to other areas of the state and a decline in government job creation. The Juneau economy is periodically staggered by efforts to relocate the State Capital, and for years has been trying to diversify its economic and employment base to make up for lost government jobs. Job creation in recent years has been primarily in the tourism and retail sectors, which are typically seasonal, low paying, and frequently without benefits. Coeur has a strong commitment to hiring locally. The Kensington would be the second largest private employer in the region, and one of the few new sources of full time employment at a living wage with benefits.

27. The present economic impact of activity at the Kensington Mine is significant, with more than 300 workers, most of them hired locally. Once in operation, the mine is expected to provide approximately 225 high paying jobs with an estimated annual payroll of $16 million. This activity has a significant multiplier effect throughout the community, creating an additional estimated 500 indirect and induced jobs, as described in the socio-economic impact analysis performed as part of the project EIS.

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[3] This information was provided to the CBJ Assembly and citizens of Juneau by the Juneau Economic Development Council in a July 2006 report, available on line at www.jedc.org/indicators.htm.

28. In recent years, Juneau has had to hold the line, and in some instances, to decrease its funding for services and community programs. CBJ has already accounted for the anticipated property and sales taxes from the mine in its budget projections.

29. Were the Court to enjoin further mine related activity pending appeal, Juneau would suffer an immediate rise in local unemployment and a drop in associated economic activity, with an attendant reduction in tax revenues and rise in demand for services.

30. In a recent survey provided to the CBJ by the Juneau Economic Development Council 76% of Juneau residents identified the Kensington Mine as important or very important to Juneau's economic future (second only to improved ferry service). All Southeast Alaska businesses surveyed responded that the Mine is important or very important to their economic future.[4]

31. For all the foregoing reasons, an injunction pending appeal of this Court's decision would result in irreparable harm to Goldbelt, its Tlingit Indian shareholders, the community of Juneau, and all of northern Southeast Alaska. The Court should not disrupt the ongoing economic and employment activity generated by the Kensington Mine, especially since the District Court has ruled that plaintiff's claims are without merit.

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[4] The survey is available on line at www.jedc.org/indicators.htm.

DATED this 15th day of August, 2006, at Juneau, Alaska.

/s/Randy Wanamaker
Randy Wanamaker

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: GOODWIN and REINHARDT, Circuit Judges.

Appellants' motions to file an over-length motion and over-length reply are granted. The Clerk shall file the emergency motion for an injunction pending appeal and the reply in support of that motion received herein on August 10, 2006 and August 22, 2006, respectively.

Appellee Coeur Alaska, Inc.'s motion to strike appellants' emergency motion for injunctive relief is denied.

Appellants' motion for an injunction pending appeal is granted, without bond. The U.S. Army Corps of Engineers, the U.S. Forest Service, and Coeur Alaska, Inc. are hereby enjoined from authorizing, allowing, or conducting any further construction activities relating to the use of Lower Slate Lake as a disposal site for mine tailings, including, but not limited to, cutting trees, building roads, clearing vegetation, excavating or filling wetlands, building dams or other structures, diverting streams, or altering the natural water level of Lower Slate Lake or the natural flow of East Fork Slate Creek, until further order of this court.

Nothing in this injunction shall prohibit measures needed to restore stream flows, stabilize soils, or prevent erosion.

Appellants' request for expedited briefing and hearing of this appeal is granted. The opening brief and excerpts of record are due September 12, 2006; the answering brief is due October 3, 2006; and the optional reply brief is due within seven days after service of the answering brief.

This appeal will be calendared before the first available panel in the week of November 13, 2006.

Filed: August 24, 2006

APPENDIX X

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Appellee Coeur Alaska, Inc.'s Urgent Motion Under Circuit Rule 27-3(b) to Vacate the Injunction Pending Appeal is denied. The court granted Appellant Southeast Alaska Conservation Council's ("SEACC") Emergency Motion Under Circuit Rule 27-3 on August 24, 2006, at which time the court issued an injunction pending appeal. The court's order

enjoined Coeur Alaska, the U.S. Army Corps of Engineers ("Corps"), and the U.S. Forest Service from activities relating to the construction of a disposal facility at Lower Slate Lake. On November 7, 2006, Coeur Alaska filed its motion to vacate the injunction due to weather conditions and in light of the U.S. Supreme Court's recent decision in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006).

We conclude that Coeur Alaska's challenge to the injunction, to the extent that it is based on *Purcell*, is untimely. *See* 9th Cir. R. 27-10(a). Even if the form of the injunction were subject to challenge now, we conclude that *Purcell* does not require the court to vacate its injunction. Thus, we confirm issuance of the injunction until the court decides the merits of this case and the mandate issues.

In *Purcell*, the Supreme Court vacated a "bare order" issued by this court that conflicted with a district court's later factual findings. *Id.* at 7–8. In that case, the Supreme Court stated that this court had failed "to provide any factual findings or indeed any reasoning of its own." *Id.* at 8. Coeur Alaska's remedy for failure of the injunction to meet *Purcell's* specificity requirement was, as was done in *Purcell* itself, to petition to the Supreme Court for *certiorari* relief, which Ceour Alaska did not do. Moreover, the Supreme Court gave no indication that this court could not have corrected the situation by offering a justification for its injunction at a later point: Accordingly, even if the court's injunction in this case was insufficient in its level of detail, we will remedy that lack of detail by explaining our reasons for granting the injunction.

An injunction pending appeal is appropriate in this case. In deciding whether to grant an injunction

pending appeal, the court "'balances the plaintiff's likelihood of success against the relative hardship to the parties.'" *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1092 (9th Cir. 2005) (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). This court has recognized two different sets of criteria for preliminary injunctive relief. Under the "traditional test," the moving party must show: "'(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).'" *Id.* (quoting *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005)). The "alternative test" requires that the moving party demonstrate "'*either* a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.'" *Id.* (quoting 408 F.3d at 1120). As this court has explained many times, "'[t]hese two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum.'" *Id.* at 1092–93 (quoting 408 F.3d at 1120).

Applying this test, SEACC has demonstrated the need for an injunction pending appeal. First, SEACC has shown a likelihood of success on the merits because it has argued persuasively that the Corps' permit to Coeur Alaska violates the Clean Water Act. Second, SEACC has demonstrated that construction of a permanent dam at Lower Slake Lake will ad-

versely affect the environment by destroying trees and other vegetation, and by killing aquatic life. Coeur Alaska has not disputed these facts. Ongoing harm to the environment constitutes irreparable harm warranting an injunction. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). When a project "'may significantly degrade some human environmental factor,' injunctive relief is appropriate." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001) (quoting *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995)). Third, the balance of hardships favors SEACC. Coeur Alaska admitted to this court in its brief in response to SEACC's emergency motion for an injunction pending appeal that disposal of tailings into Lower Slate Lake is not scheduled to begin until, at the earliest, next spring. Consequently, construction activities need not begin immediately. Furthermore, as discussed below, the court's injunction allows Coeur Alaska to implement measures necessary to stabilize the coffer darn. Given the risk of irreparable harm to the environment, the balance of hardships tips decidedly in SEACC's favor. Finally, the public interest strongly favors preventing environmental harm. Although the public has an economic interest in the mine, there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation. Therefore, applying the court's sliding scale to the record, we conclude that an injunction pending appeal is appropriate in this case.

Our determination concerning the relative hardships does not conflict with that of the district court. When considering SEACC's motion for accelerated

briefing to the district court relating to its motion for an injunction pending appeal, the district court stated that an expedited consideration of SEACC's motion for an injunction pending appeal was not warranted because no additional harm would occur if the court followed a normal briefing schedule. The district court did not actually consider the merits of SEACC's motion. In fact, the district court expressly did not address the balance of hardships. Thus, the district court's order merely addressed timing of briefing to the district court and did not make findings relevant to irreparable harm. SEACC's motion to the district court for an injunction pending appeal was withdrawn when this court granted SEACC's motion for an injunction pending appeal, and thus no findings on the merits were made.

To justify vacating the injunction (other than on the failure to comply with *Purcell's* specificity requirement), Coeur Alaska must demonstrate that facts have changed sufficiently since the court issued its order. *See Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Coeur Alaska argued in its motion that the court's injunction prevents it from taking measures to prevent environmental degradation. According to Coeur Alaska, excessive precipitation this autumn has jeopardized the integrity of a coffer dam constructed at the lake's outfall point, which could increase sediment levels in downstream waters. But the court's order granting SEACC's motion for an injunction pending appeal allows Coeur Alaska to take the steps necessary to prevent the alleged environmental harm. The court's order states: "Nothing in this injunction shall prohibit measures needed to restore stream flows, stabilize soils, or prevent erosion." Accordingly, the injunction permits Coeur Alaska to take measures necessary to

stabilize the coffer dam. Assuming Coeur Alaska's factual assertions to be true, Coeur Alaska has failed to demonstrate that construction of a permanent dam is the only measure capable of averting environmental harm. For example, Coeur Alaska could take several lesser measures to prevent breaching of the coffer dam, including installation of a spillway, or removal or reduction in height of the coffer dam itself. The court's order permits Coeur Alaska to take those measures. Thus, Coeur Alaska has not met its burden to show that the injunction should be vacated.

For these reasons, Coeur Alaska's urgent motion to vacate the injunction pending appeal is denied. The court directs all parties, including the government, to meet and consider how best to address the threat posed by weather conditions to the integrity of the coffer dam.

Filed: December 8, 2006

APPENDIX Y

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 06-35679.

SOUTHEAST ALASKA CONSERVATION COUNCIL; Sierra Club; Lynn Canal Conservation,

Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; Timothy J. Gallagher, Colonel, in his official capacity as District Engineer; Larry L. Reeder, in his official capacity as Chief of the Regulatory Branch; Dominic Izzo, in is official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); United States Forest Service,

Defendants-Appellees,

Coeur Alaska, Inc.; Goldbelt, Inc.; State of Alaska,

Defendants-Intervenors-Appellees.

Argued and Submitted Dec. 4, 2006.
Filed May 22, 2007.

* * * *

Thomas S. Waldo and Demian A. Schane, Earthjustice, Juneau, AK, for plaintiffs-appellants. John T. Stahr and Mark A. Nitczynski, U.S. Department of Justice, Environment & Natural Resources Division, Washington, D.C., for defendants-appellees.

David J. Burman and Robert A. Maynard, Perkins Coie LLP, Boise, Idaho; John C. Berghoff, Jr., and Michael P. Rissman, Mayer Brown Rowe & Maw LLP, Chicago, IL; Cameron M. Leonard, State of Alaska, Department of Law, Fairbanks, AK; and David C. Crosby, David C. Crosby PC, Juneau, AK, for defendants-intervenors-appellees.

Melissa Powers and Allison LaPlante, Pacific Environmental Advocacy Center, Portland, OR; Joseph M. Lovett, Appalachian Center for the Economy & the Environment, Lewisburg, WV; and Peter Van Tuyn, Bessenyey & Van Tuyn, Anchorage, AK, for amici curiae in support of plaintiffs-appellants.

John W. Hartle, City and Borough of Juneau, Juneau, AK; Amy Gurton Mead, Robertson, Monagle & Eastaugh, Juneau, Alaska; Steven J. Lechner, Mountain States Legal Foundation, Lakewood, CO; Michael R. Shebelskie, Hunton & Williams LLP, Richmond, Virginia; Harold P. Quinn, Jr., National Mining Association, Washington, D.C.; and Stephen F. Sorensen, Simpson, Tillinghast & Sorensen PC, Juneau, AK, for amici curiae in support of defendants-appellees.

Appeal from the United States District Court for the District of Alaska; James K. Singleton, Senior District Judge, Presiding. D.C. No. CV-05-00012-J-JKS.

Before PROCTER HUG, JR., A. WALLACE TASHIMA, and SUSAN P. GRABER, Circuit Judges.

HUG, Circuit Judge.

This case presents the question of whether the issuance of a permit by the U.S. Army Corps of Engineers violates the Clean Water Act.[1] The permit issued in this case authorizes Coeur Alaska, Inc., to discharge process wastewater containing tailings from its gold mine into a lake that is a navigable water of the United States. Coeur Alaska proposes to discharge daily 210,000 gallons of process wastewater containing 1,440 tons of tailings from its mine into Lower Slate Lake. The tailings in the discharge will raise the bottom elevation of the lake by 50 feet. A 90-foot high, 500-foot long dam will be built to contain the discharge and the area of the lake will be increased about three-fold. The U.S. Army Corps of Engineers contends that the permit was properly granted under § 404 of the Clean Water Act, which relates to the disposal of "fill material," and that it is not subject to the effluent restrictions of § 301 or § 306 of the Clean Water Act. The plaintiffs contend that this mine disposal discharge must comply with the effluent restrictions of § 301 and § 306, and that any permit allowing discharge must be issued by the Environmental Protection Agency. The district court held that the issuance of the permit was proper. We reverse and remand with instructions to vacate the permit.[2]

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[1] 33 U.S.C. §§ 1251–1387.

[2] We also vacate the permit granted to Goldbelt, Inc., to construct the Cascade Point Marine Facility in Berners Bay and the U.S. Forest Service's Record of Decision approving the general plan because they are dependent on

[Footnote continued on next page]

I.

Coeur Alaska intends to open the Kensington Gold Mine on the site of a prior mine in southeast Alaska that operated from 1897 to 1928. Although the mining operation will include several above-ground facilities, the mine itself will be entirely subterranean.

To process the gold ore retrieved from the mine, Coeur Alaska will construct a froth-flotation mill facility. In the froth-flotation process, ore-bearing rock from the mine will be transported to a mill and moved through a series of mechanical crushing and grinding procedures. After the rock is finely ground, it will be fed into a tank where water and chemicals referred to as conditioners, frothers, surfactants, and scale inhibitors will be added. Air is then pumped into the tank, producing bubbles that attach to the gold deposits. The bubbles rise, bringing the gold with them and forming a froth that is skimmed off the top.

After the gold has bubbled up to the surface and the froth is removed, the tailings—residual ground rock—remain as a waste product. Of the 2,000 tons of ore that the Kensington mine will process each day, only about 100 tons (5 percent) contain economically viable gold minerals. About 40 percent of the tailings will be used as backfill in the mine. The remaining volume is, according to Coeur Alaska, too large to transport off site and presents a waste disposal problem. This dispute arises from Coeur

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the validity of the permit issued by the U.S. Army Corps of Engineers to Coeur Alaska.

Alaska's current plan for addressing that disposal problem.

Coeur Alaska's earlier plan of operations for the Kensington Gold Mine called for the construction of a "dry tailings facility," in which the mine would dispose of waste from its froth-flotation mill on dry "uplands." This disposal process involved the construction of berm and drainage structures around the designated disposal area, dewatering the process wastewater, and placement of the tailings within an enclosure. After the closure of the mine in about 10 to 15 years, Coeur Alaska would have been required to cover the disposal area with native material to support revegetation. The U.S. Forest Service ("Forest Service") approved the plan of operations for the dry tailings facility, and the U.S. Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") issued permits to the company authorizing the construction of this facility in 1997. The price of gold subsequently dropped to $400 an ounce, however, prompting Coeur Alaska to investigate less expensive ways to develop the mine project.[3] In 2004, Coeur Alaska proposed a new plan of operations with significant amendments. The most important change for our purposes was that, instead of the dry tailings facility, Coeur Alaska proposed to discharge its process wastewater containing the tailings directly into nearby Lower Slate Lake.

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[3] The price of gold has since been rising steadily and is currently over $680 an ounce, thus the original motivation for the change in waste disposal from the mine no longer exists.

Lower Slate Lake, a 23-acre subalpine lake in the Tongass National Forest, is one of several small lakes in the vicinity of the mine. The lake is a fish and wildlife habitat and supports about 1,000 Dolly Varden Char (a freshwater fish) and other native fish and aquatic life. The lake is also a tributary of Slate Creek and drains into Berners Bay.

Coeur Alaska's current disposal plan involves piping approximately 210,000 gallons of process wastewater, including 1,440 tons of tailings, each day to the bottom of Lower Slate Lake in the form of a slurry. This slurry would consist of about 45 percent water and 55 percent tailings. A polymer and flocculent would be added to the slurry to enhance settling of the tailings. Over the 10- to 15-year life of the mine, approximately 4.5 million tons of tailings would be deposited into the lake. The discharge ultimately would raise the bottom of the lake 50 feet, to its current high water mark, and nearly triple its surface area. Coeur Alaska and the Corps admit that the discharge and settling of the tailings into the lake would kill all the fish and nearly all the aquatic life. The effluent would have a pH factor of over 10, which is considerably higher than the lake's current pH factor, and would contain concentrations of several potentially hazardous materials, including aluminum, copper, lead, and mercury. The toxicity of the discharge may have lasting effects on the lake and may negatively affect its ability to sustain aquatic life in the future. The Corps intends that aquatic life would be reintroduced into the lake, but the extent to which aquatic life could be restored eventually is unclear.

To prepare the lake for use as a wastewater disposal facility and the consequent expansion of the lake's

surface, Coeur Alaska would construct a 90-foot high, 500-foot long dam at the lake's outfall point. Coeur Alaska's long-term plan to use the lake as a disposal facility also includes the construction of a diversion ditch. Constructing the ditch would require cutting trees on 7.6 acres of forested land, building a 30-foot wide road, excavating and digging a 3,000-foot ditch, and filling in 4.3 acres of nearby wetlands with 28,800 cubic yards of fill material. In addition, during the 10- to 15-year period of the lake's use as a disposal facility, Slate Creek would be diverted around the lake through a pipeline.

The Forest Service approved Coeur Alaska's current plan of operations at the Kensington Gold Mine, including the revised disposal plan, in a Record of Decision ("ROD") on December 9, 2004. Because the proposed discharge would have the effect of raising the bottom elevation of Lower Slate Lake, the Corps reasoned that the permit program under § 404 of the Clean Water Act, rather than § 402, applies to Coeur Alaska's planned discharges. Accordingly, the Corps issued a permit for the discharge into Lower Slate Lake on June 17, 2005.

Under the permit, when operations at the mine eventually cease, the Corps would require Coeur Alaska to mitigate the environmental impacts at the lake by installing a cap of native material over the tailings at the bottom of the lake. The Corps would also require Coeur Alaska to reintroduce native fish species into the lake and monitor the health of the ecosystem.

II.

Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") filed this lawsuit challenging the Corps' permit and the Forest Service's ROD approving the

general plan on the grounds that they violate § 301(a), § 301(e), and § 306(e) of the Clean Water Act. The crux of SEACC's argument is that the Corps violated the Clean Water Act by issuing a permit for the discharge of process wastewater from a froth-flotation mill into a body of water protected by the Clean Water Act.

After the complaint was filed, the Corps decided to suspend the permit and reconsidered its decision to issue the permit. For that purpose, the Corps moved for voluntary remand of the case before briefing on the merits began, which the district court granted on November 14, 2005. The Corps reinstated the original permit, without changes, on March 29, 2006. At the same time, the Corps issued a revised ROD in which it explained its rationale. SEACC then filed an amended complaint, in which it reiterated its allegations and reasserted its causes of action. Coeur Alaska, Goldbelt, Inc., and the State of Alaska intervened as defendants. The parties filed cross-motions for summary judgment.

The district court granted summary judgment to the defendants on August 4, 2006. In its opinion, the district court focused on whether the Corps misapplied § 404 of the Clean Water Act. The district court noted that SEACC challenged the granting of the permit on the grounds that it did not comply with § 301(e) and § 306(e). It held that if the permit was issued under § 404 for the disposal of "fill material," then § 301(e) and § 306(e) were inapplicable.

SEACC appealed on August 7, 2006, three days after the district court's decision, and this court, on SEACC's motion, granted an injunction pending appeal on August 24, 2006, which prohibited Coeur Alaska, the Corps, and the Forest Service from pro-

ceeding with further construction activities related to preparing the lake for use as a waste disposal site. *See SEACC v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1099 (9th Cir. 2006). Since granting the injunction, we have addressed two emergency motions related to stabilizing a temporary coffer dam that was hastily constructed by Coeur Alaska prior to the injunction. *Id.*; *SEACC v. U.S. Army Corps of Eng'rs*, 479 F.3d 1148, 1151–52 (9th Cir. 2007).

III.

We review the district court's grant of summary judgment de novo and must determine whether the district court correctly applied the relevant substantive law. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 973 (9th Cir. 2003); *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). "De novo review of a district court judgment concerning a decision of an administrative agency means the court views the case from the same position as the district court." *Turtle Island*, 340 F.3d at 973 (citing *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)). Judicial review of administrative decisions under the Clean Water Act is governed by § 706 of the Administrative Procedure Act ("APA"). *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). Under the APA, a court may set aside an agency action if the court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Turtle Island*, 340 F.3d at 973.

IV.

Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern Coeur Alaska's proposed plan of operations at

the Kensington Gold Mine, but they result in different interpretations of the Act. The discharge of wastewater containing tailings from Coeur Alaska's froth-flotation mill operation facially meets the Corps' current regulatory definition of "fill material" because it would have the effect of raising the bottom elevation of the lake. *See* 33 C.F.R. § 323.2(e). Accordingly, under this interpretation, the discharge would be subject to the permit process governed by § 404 of the Clean Water Act. However, EPA previously promulgated a performance standard, pursuant to § 301 and § 306 of the Clean Water Act, that prohibits discharges from froth-flotation mills into waters of the United States. *See* 40 C.F.R. § 440.104(b)(1).

Both of the regulations appear to apply in this case, yet they are at odds. As explained below, the plain language of the Clean Water Act resolves this conflict and requires that the performance standard controls. The statute is unambiguous on this point, and the performance standard applies to discharges from the froth-flotation mill at Coeur Alaska's Kensington Gold Mine into Lower Slate Lake. Furthermore, the federal agencies' clear statements at the time they adopted the current regulatory definition of the term "fill material" demonstrate that they did not intend for waste products subject to effluent limitations and performance standards to be regulated as "fill material." For these reasons the Corps should not have issued a permit to Coeur Alaska under § 404. The district court's grant of summary judgment in favor of the Corps is reversed, and we remand for summary judgment to be entered in favor of the plaintiffs with directions to vacate the permit granted by the Corps.

A.

We begin, as we must, with the text of the Clean Water Act itself to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9, 104 S. Ct. 2778.

1.

Congress passed the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity" of the waters of the United States. 33 U.S.C. § 1251(a). To achieve this objective, the Clean Water Act sought to eliminate completely the discharge of all pollutants into the nation's navigable waters by 1985. 33 U.S.C. § 1251(a)(1). It also sought to make those waters suitable for fish, shellfish, wildlife, and recreation. 33 U.S.C. § 1251(a)(2). One of Congress's principal concerns in passing the Clean Water Act was the use of water for waste disposal, which Congress deemed "unacceptable." *See* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable."), *quoted in Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1043 (9th Cir. 1978).

The "cornerstone" and "fundamental premise" of the Clean Water Act is § 301, which prohibits all discharges of any pollutant except in compliance with

specified provisions of the statute. *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987). Specifically, § 301(a) provides that "the discharge of any pollutant by any person shall be unlawful" except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404.[4] 33 U.S.C. § 1311(a). In furtherance of this mandate, § 301(b) requires EPA to adopt increasingly stringent, technology-based effluent limitations[5] for point sources.[6] Once an effluent limitation is promulgated, § 301(e) requires that it "shall be applied to *all* point sources of discharge of pollutants in accordance with the provisions of" the statute. 33 U.S.C. § 1311(e) (emphasis added).

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[4] The full text of § 301 states: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

[5] "The term 'effluent limitation' means any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, ... including schedules of compliance." 33 U.S.C. § 1362(11).

[6] "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Similarly, § 306 requires EPA to implement even more stringent "standards of performance" for new sources such as the new Coeur Alaska mine project.[7] 33 U.S.C. § 1316(b). To carry out § 306's directive, EPA must promulgate a list of categories of sources and, for new sources within each category, establish a national standard of performance (also referred to as a New Source Performance Standard). *Id.* A standard of performance is defined as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which [EPA] determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting *no discharge* of pollutants." 33 U.S.C. § 1316(a)(1) (emphasis added). As with the effluent reductions promulgated under § 301,[8] § 306 states that, once a standard of performance takes effect, "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard o'

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[7] "The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. § 1316(a)(2).

"The term 'source' means any building, structure, facility, or installation from which there is or may be the discharge of pollutants." 33 U.S.C. § 1316(a)(3).

[8] A standard of performance is one type of effluent limitation. *See* 33 U.S.C. § 1362(11). Therefore, § 301(e) and § 306(e) have the same practical effect in this case.

performance applicable to such source." 33 U.S.C. § 1316(e). Congress thus "intended these regulations to be absolute prohibitions." *E.I. du Pont de Nemours & Co. v. Train* ("*Du Pont*"), 430 U.S. 112, 138, 97 S. Ct. 965, 51 L.Ed.2d 204 (1977) (citing S. Rep. No. 92-414, at 58 (1971)). The legislative history of § 306 indicates that Congress made a "deliberate choice not to allow variances for new sources." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 192 (2d Cir. 2004). As such, no exceptions to a standard of performance are allowed. *See id.*; *Du Pont*, 430 U.S. at 138, 97 S. Ct. 965.

To ensure compliance with effluent limitations and performance standards established pursuant to § 301 and § 306, Congress created the National Pollutant Discharge Elimination System ("NPDES") permit program under § 402 of the Act. Through the NPDES program, EPA may permit a discharge, but only if it complies with § 301 and § 306. Additionally, NPDES permits are supposed to limit the release of pollutants into waterways as much as possible by imposing numerical discharge restrictions. *Rybachek v. EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990). For this reason, the NPDES permit program is considered "central to the enforcement" of the Clean Water Act. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977).

In addition to the NPDES permit program, the Clean Water Act established a secondary permit program for the discharge of "dredged or fill material" under § 404. According to § 404, the Corps "may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). We conclude that the permit scheme under § 404 is a limited permit program that

applies only to dredged or fill material, not to the discharge of pollutants from industrial or municipal sources.

2.

The language of the Clean Water Act is clear on the issue at the center of this dispute. First, § 301(a) prohibits *any* discharge that does not comply with several enumerated sections, including both § 301 and § 306, as well as § 402 and § 404. 33 U.S.C. § 1311(a). The use of "and" as a connector, instead of "or," indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404. Second, § 301(e) applies effluent limitations established by EPA to *all* discharges. 33 U.S.C. § 1311(e). Third, § 306(e) prohibits *any* discharge that does not comply with performance standards promulgated by EPA. 33 U.S.C. § 1316(e). In clear and precise terms, § 301 and § 306 require that discharges comply with applicable effluent limitations and standards of performance. Neither § 301 nor § 306 contains an exception for discharges that would otherwise qualify for regulation under § 404. Rather, § 301 and § 306 are "absolute prohibitions" with no exceptions. *Du Pont*, 430 U.S. at 138, 97 S. Ct. 965.

Nevertheless, the defendants argue that § 301 and § 306 do not apply to § 404 permits because § 402 explicitly requires compliance with those sections whereas § 404 does not. The defendants then reason, by way of negative inference, that § 404 contains an implied exception to the requirements of § 301 and § 306 whenever a proposed discharge would meet the agencies' regulatory definition of "fill material." We disagree. Negative inferences and implied exceptions

are generally disfavored. As the Supreme Court stated in *United States v. Rutherford*, 442 U.S. 544, 99 S. Ct. 2470, 61 L.Ed.2d 68 (1979): "Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *Id.* at 552, 99 S. Ct. 2470 (citing *Helvering v. Hammel*, 311 U.S. 504, 510–11, 61 S. Ct. 368, 85 L.Ed. 303 (1941)). That is because courts have "generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular language. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, --- U.S. ----, 126 S. Ct. 1843, 1852, 164 L.Ed.2d 625 (2006) (quoting *Bates v. United States,* 522 U.S. 23, 29–30, 118 S. Ct. 285, 139 L.Ed.2d 215 (1997)). The defendants have produced no compelling reason to believe that Congress intended an exception within § 404 that it did not explicitly create. If the defendants' interpretation were correct, Congress would have written § 301 and § 306 within § 402, not as separate sections. Moreover, the implied exception urged by the defendants, if adopted, would turn § 404 into an exception that swallows the rule created by § 301, § 306, and § 402 by allowing the Corps to use a negative inference from an exception clause within § 402. Thus, § 404's silence regarding the explicit and detailed requirements in § 301 and § 306 cannot create an exception to those sections' strongly-worded blanket prohibitions.

The defendants' interpretation would render § 301(e) and § 306(c) effectively meaningless. Courts strive to avoid interpreting a statute "in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir.

1991), *quoted in Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1024 (9th Cir. 2005); *see also Ratzlaf v. United States*, 510 U.S. 135, 140–41, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994); *Watt v. Alaska*, 451 U.S. 259, 267, 101 S. Ct. 1673, 68 L.Ed.2d 80 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."). If the defendants were correct, the words "all" in § 301(e) and "any" in § 306(e)[9] would lose their meaning entirely.

There is a much simpler explanation for the difference in language between § 402 and § 404 than the defendants' proposed negative inference. If EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge. *See* 67 Fed. Reg. 31,129, 31,135 (May 9, 2002); EPA/Corps, Joint Response to Comments 12 (May 3, 2002). Accordingly, the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for

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[9] Section 301(e) provides: "Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to *all* point sources of discharge of pollutants in accordance with the provisions of this chapter." 33 U.S.C. § 1311(e) (emphasis added).

Section 306(e), which applies to new sources like the Coeur Alaska mine project, provides: "After the effective date of standards of performance promulgated under this section, it shall be unlawful for *any* owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316 (emphasis added).

discharges subject to an effluent limitation under § 301 or a standard of performance under § 306. Consequently, there was simply no need for Congress to enumerate § 301 or § 306 within § 404 because Congress never intended for § 404 to govern discharges subject to effluent limitations or performance standards. Rather, when a discharge is subject to an effluent limitation or performance standard, that discharge must comply with the NPDES program as required by § 402. *See* 67 Fed. Reg. at 31,135; 47 Fed. Reg. 54,598, 54,606 (Dec. 12, 1982). This construction of the statute preserves the full meaning of all of its provisions without rendering any provision superfluous or resorting to negative inferences and implied exceptions.

Additionally, although § 404 does not contain an explicit exception to effluent limitations or standards of performance, it does contain exceptions to other provisions of the Clean Water Act. Specifically, § 404(f) exempts discharges of dredged or fill material from certain activities from regulation under § 301(a), § 402, and § 404. 33 U.S.C. § 1344(f)(1). Discharges related to agricultural activities and road construction, among others, are exempted under § 404(f)(1). Mining is not listed as an exempt activity. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S. Ct. 1905, 64 L.Ed.2d 548 (1980). The defendants have produced no reason to believe that Congress intended additional exemptions to be created later. Therefore, the lack of any explicit exception to § 301 and § 306 within § 404, and the lack of an exception for process wastewater from mines, is strong evidence that Congress did not

intend one. *Id.* Even stronger evidence is Congress's insistence in § 404(f) that even the discharges from the enumerated activities continue to be subject to effluent standards. 33 U.S.C. § 1344(f).

Thus, the plain language of the Clean Water Act directly resolves the conflict between the regulatory definition of "fill material" and EPA's performance standard for froth-flotation mill operations. Pursuant to § 301 and § 306, EPA's performance standard for froth-flotation mills governs this situation. The language of § 404 does not lead to a contrary conclusion.

B.

Although the plain language of the Clean Water Act resolves the apparent regulatory conflict at the heart of this case, the regulatory history further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of "fill material" to replace the performance standard for froth-flotation mills. Courts consider contemporaneous explanations of regulations, such as those published in the Federal Register through notice-and-comment rulemaking, in order to determine an agency's intent. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714–16, 105 S. Ct. 2371, 85 L.Ed.2d 714 (1985); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 797 (9th Cir. 2003); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1189–90 (9th Cir. 2002); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 446–47 (4th Cir. 2003). And courts will not defer to an agency's interpretation of a regulation that contradicts the agency's intent at the time it promulgated the regulation. *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 916, 163 L.Ed.2d 748 (2006);

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L.Ed.2d 405 (1994); *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 627–28 (9th Cir. 2005); *see also Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997) (an agency's interpretation of a regulation is not entitled to deference where it is "plainly erroneous" or "inconsistent with the regulation") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L.Ed. 1700 (1945)). When the agencies promulgated the current definition in 2002, they foresaw and specifically addressed the potential conflict between the effects-based definition of "fill material" and performance standards already in place. To that end, the agencies explicitly stated that wastes subject to performance standards and effluent limitations would not be considered "fill material." The Corps' application of the fill rule in this case, therefore, contradicts its interpretation at the time the regulation was promulgated.

1.

Following its statutory obligation under § 301 and § 306, in 1982 EPA promulgated effluent limitations and standards of performance for sources within the category of ore mining. *See* 47 Fed. Reg. 25,682 (June 14, 1982) (proposed); 47 Fed. Reg. 54,598 (Dec. 3, 1982) (final). Within this category, EPA established a subcategory that applied to gold mining. *See* 40 C.F.R. §§ 440.100–440.104. For gold mines using the froth-flotation mill process, EPA promulgated a zero-discharge standard:

> Except as provided in paragraph (b)[2] of this section, there shall be *no discharge* of process waste-water to navigable waters from mills that use

> the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores.

40 C.F.R. § 440.104(b)(1) (emphasis added); *see also* 47 Fed. Reg. at 25,697 (proposing zero discharge). EPA found that the zero-discharge standard was practicable because the majority of facilities existing at the time already achieved zero discharge through recycling and evaporation processes. 47 Fed. Reg. at 54,602. EPA promulgated this standard knowing that process wastewater discharges from froth-flotation mills contain a large amount of suspended solids that could otherwise qualify for regulation under § 404 pursuant to its effects-based definition of "fill material." *See* 47 Fed. Reg. at 25,685 ("Mill process wastewater is characterized by very high suspended solids levels (often in the percent range rather than milligrams per liter) . . . ."). In determining that a strict zero-discharge limit was appropriate, EPA determined that the best available control technology included the complete recycling of process wastewater. *See* 47 Fed. Reg. at 54,602. Given that the regulation facially applies to *any* discharge from a froth-flotation mill, and that it provides some limited exceptions that do not include "fill material," EPA intended for the prohibition to apply to discharges that would otherwise qualify as fill material under § 404. *See* 67 Fed. Reg. at 31,135. This conclusion is also supported by the fact that EPA promulgated the regulation notwithstanding its definition of "fill material," which was identical to the definition used by both agencies today.

2.

The history of the current fill rule also demonstrates that both agencies intended for effluent limitations and performance standards to apply even to discharges that facially meet the definition of the term "fill material." The Clean Water Act does not define the term "fill material." Instead, Congress implicitly left that term to the Corps and EPA to define. *See Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1166 (9th Cir. 1998). As with most regulatory definitions, the agencies' definitions of "fill material" have evolved over time. In fact, prior to the current regulatory definition of "fill material," the Corps and EPA defined "fill material" differently. The Corps initially used an effects-based test, which defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose." 40 Fed. Reg. 31,320, 31,325 (July 25, 1975). EPA later adopted the identical definition. 40 Fed. Reg. 41,292, 41,298 (Sept. 5, 1975). Two years later, the Corps revised its definition and adopted a purpose-based test, which excluded from its definition "any pollutant discharged into the water primarily to dispose of waste." 42 Fed. Reg. 37,122, 37,145 (July 19, 1977). In adopting its purpose-based definition, the Corps explained that there were many waste materials "which technically fit within our definition of 'fill material' but which were intended to be regulated under the NPDES program." *Id.* at 37,130. EPA, in 1980, chose to keep its effects-based test. *See* 45 Fed. Reg. 33,290, 33,421 (May 19, 1980).

The agencies' differing definitions of "fill material" created a potential regulatory overlap. *See, e.g., Res.*

Invs., 151 F.3d at 1165–66, 1168–69 (acknowledging overlap); *Kentuckians*, 317 F.3d at 432 ("the Corps acknowledged that the differing approaches in defining 'fill material' employed by EPA and the Corps in their regulations had created some uncertainty about their interpretation of the Clean Water Act"). Many industrial wastes contain a high proportion of suspended solids and, therefore, have the effect of changing the bottom elevation of a body of water. As such, those wastes could have been considered fill material under EPA's definition. However, EPA continued to regulate many of those industrial wastes under § 402, and also continued to promulgate new effluent limitations and standards of performance for industrial pollutants with high concentrations of solids, regardless of their potential to raise the bottom elevation of a body of water. *See*, *e.g.*, 46 Fed. Reg. 8,260, 8,292 (Jan. 26, 1981) (regulating discharges of suspended solids from log-washing processes). Indeed, the new source performance standard for froth-flotation mills was adopted in 1982, despite the fact that waste from this process would have the effect of raising bottom elevation and, therefore, could otherwise constitute fill material under EPA's effects-based test. *See* 47 Fed. Reg. at 25,685. Thus, notwithstanding the potential regulatory overlap created by the agencies' differing definitions, EPA regulated many industrial pollutants under § 402. The agencies formally adopted this practice in a Memorandum of Agreement on Solid Waste ("MOA") in 1986. 51 Fed. Reg. 8,871 (Mar. 14, 1986). After adoption of the MOA in 1986, the Corps continually declined to exercise jurisdiction over mine tailings.[10]

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[10] *See*, *e.g.*, Memorandum from Col. John W. Pierce, U.S.

[Footnote continued on next page]

In 2002, the agencies promulgated their joint regulation defining the terms "fill material" and "discharge of fill material." 67 Fed. Reg. at 31,130. The current regulatory definition of "fill material" provides:

> (1) Except as specified in paragraph (e)(3) of this section, the term "fill material" means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris,

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Army Corps of Eng'rs, "Agency Jurisdiction over Certain Activities Connected with Mineral Extraction, Specifically Gold Mining, in Alaska" 1–2 (Apr. 14, 1992) ("The tailings behind the dam, however, are a waste product of the mining operation and are not under our jurisdiction according to the 1986 Memorandum of Agreement...."); Letter from Glen E. Justis, U.S. Army Corps of Eng'rs 2–3 (June 18, 1991) ("The Corps has neither special expertise [n]or jurisdiction by law to evaluate the impacts of the tailings discharge.... The tailings do not meet the Corps' definition of fill material.").

> wood chips, overburden from mining[11] or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

33 C.F.R. § 323.2(e) (Corps' regulation); 40 C.F.R. § 232.2 (EPA's regulation) (emphasis added). The agencies also defined "discharge of fill material" as follows:

> The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: . . . placement of overburden, slurry, or tailings or similar mining-related materials . . . .

33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.[12]

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[11] "Overburden" is generally defined as rock or soil cleared away before mining. *See* EPA, *Terms of Environment*, http://www.epa.gov/OCEPAterms/oterms.html (May 14, 2007).

[12] The *amici* brief of 14 members of Congress argues persuasively that the adoption of these regulations by the Corps and EPA violates the purposes and plain language of the Clean Water Act by allowing waste material to be dumped into lakes, rivers, and other waters of the United States. SEACC bases its argument on a narrower ground pertaining to this particular mine. Thus, we do not reach the issue of the validity of these regulations.

At the same time, however, the agencies made clear that they did not intend to change their long-standing practice, according to which EPA regulates discharges of pollutants for which it has established effluent limitations or standards of performance under the NPDES program.[13]

> [W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304[14] and 306 of the CWA establish

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13 In *Kentuckians*, the Fourth Circuit recognized the Corps' prior practice of not regulating discharges subject to effluent limitations under § 404:

> [W]e conclude that the Corps' interpretation of "fill material" as used in § 404 of the Clean Water Act to mean all material that displaces water or changes the bottom elevation of a water body *except* for "waste"—meaning garbage, sewage, and *effluent that could be regulated by ongoing effluent limitations* as described in § 402—is a permissible construction of § 404.

317 F.3d at 448. The court also explained the Corps' prior position that it was not authorized to regulate discharges subject to effluent limitations. *Id.* at 445.

14 Sections 304 and 301 are interchangeable in this instance. Section 304 directs EPA in how to determine the degree of effluent reduction attainable under § 301. *Citi-*

[Footnote continued on next page]

limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified wastestreams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.* Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs.

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zens Coal Council v. EPA, 447 F.3d 879, 883 (6th Cir. 2006) (en banc) (citing 33 U.S.C. § 1314).

67 Fed. Reg. at 31,135 (emphasis added). Additionally, in their Joint Response to Comments to the proposed rule, the agencies restated this position:

> Under today's rule, we will continue, consistent with our long-standing practice, to rely on the existence of effluent limitation guidelines or standards or a NPDES permit to inform the determination of how a particular discharge is regulated under the Act. If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa.

EPA/Corps, Joint Response to Comments 30. In the same document, the agencies clarified that the new rule would not expand the jurisdiction of the Corps or permit previously prohibited discharges: "the suggestion that this rulemaking now provides a legal basis for previously illegal activities is not the case-no discharges that were previously prohibited are now authorized as a result of this rulemaking." *Id.* Thus, the agencies clearly intended to exclude discharges subject to effluent limitations or performance standards from the new definition of "fill material."

In fact, when the Corps and EPA first proposed the revised, coordinated definition in 2000, they included an explicit exemption from the definition of "fill material" for discharges subject to effluent limitations or standards of performance. *See* 65 Fed. Reg. 21,292, 21,299 (Apr. 20, 2000). The stated purpose of the exemption was to maintain the agencies' "current practice," which was "consistent with paragraph B.5 of the 1986 Solid Waste MOA." *Id.* at 21,297. Although the agencies removed the explicit exemption

from the final rule, they did so only because commenters expressed concern that the exception was vague and would create uncertainty regarding whether the reference to effluent guidelines applied prospectively or only to those guidelines already in existence at the time. *See* 67 Fed. Reg. at 31,135. As such, the agencies still intended to regulate discharges subject to effluent limitations and standards of performance under § 402.

The defendants attempt to undermine the clear intent of the agencies by focusing on a single sentence of the preamble in which the agencies stated "mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* The district court also relied on that one sentence. However, the defendants and the district court give far more weight to that singular statement than it deserves. It is difficult to understand why the agencies would painstakingly explain in the preamble that the new definition would not change their treatment of discharges subject to effluent limitations and standards of performance, only to completely contradict themselves two paragraphs later. The agencies themselves cleared up any potential confusion in their Joint Response to Comments:

> Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. *Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific cir-*

> *cumstances, then that determination remains valid.*

EPA/Corps, Joint Response to Comments 12. Thus, the current fill rule only applies to those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance.[15] The agencies could not have been more clear in articulating that this would be their preferred approach.

3.

In fact, the agencies followed that approach with Coeur Alaska for quite some time. The Corps consistently informed Coeur Alaska that discharges from its froth-flotation mill would not be regulated as fill material under § 404. At least, the agencies took that approach up until the time that the Corps granted the permit that led to this dispute. Prior to the promulgation of the current fill rule in 2002, the

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[15] The Fourth Circuit's holding in *Kentuckians* is consistent with our conclusion. In *Kentuckians*, the court addressed the issue of whether the Corps had authority under § 404 to permit valley fills from mountain-top coal mining "when the valley fills serve no purpose other than to dispose of excess overburden from the mining activity." 317 F.3d at 439. EPA had not promulgated a performance standard for mountain-top coal mining, so neither § 301 nor § 306 was implicated in that case. *Id.* at 445. Moreover, in that case, the Corps admitted that, under the 2002 definition, "it was authorized to regulate discharges of fill, even for waste, *unless the fill amounted to effluent that could be subjected to effluent limitations.*" *Id.* (emphasis added).

Corps relied on the 1986 MOA in informing Coeur Alaska that it lacked jurisdiction and expertise to permit discharges of tailings from the Kensington mine as "fill material." For example, in a 1998 ROD, the Corps made clear to Coeur Alaska that it "does not regulate the placement of tailings." U.S. Army Corps of Eng'rs, ROD 13 (Jan. 18, 1998). And as late as 2005, EPA informed Coeur Alaska that "[b]ecause this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project." EPA, ROD for § 402 NPDES Permit 3 (June 28, 2005) (citing 40 C.F.R. § 440.104). Therefore, in addition to the regulatory history, the agencies have an established record of refusing to regulate tailings discharged from Coeur Alaska's planned froth-flotation mill at the Kensington mine as fill material under § 404.

C.

The agencies' unequivocal statements regarding their intent not to override effluent limitations and standards of performance when they promulgated the current fill rule are dispositive and compel the conclusion that the Corps overstepped its authority in issuing a permit to Coeur Alaska under § 404. If the agencies actually did intend to repeal or create an exception to the performance standard for froth-flotation mills when they promulgated the current fill rule, they did not acknowledge or provide a satisfactory explanation for the change in course. When an agency decides to change course by rescinding or changing a rule, the agency "is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983). If an agency fails to comply with that obliga-

tion, the new rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is invalid under § 706(2)(A) of the APA. *Id.* at 41, 103 S. Ct. 2856 (citing 5 U.S.C. § 706(2)(A)); *see also Bush-Quayle 92 Primary Comm., Inc. v. Fed. Election Comm'n*, 104 F.3d 448, 453 (D.C. Cir. 1997). Not only did the Corps and EPA not acknowledge a change in course when they promulgated the fill rule, they actually stated the opposite intent. That is, the agencies made clear that effluent limitations and standards of performance would continue to apply. We could not have interpreted the fill rule as creating an exception to the performance standard for froth-flotation mills without the agencies complying with the APA by explaining their intent in the Federal Register and offering an opportunity for notice and comment. *See Motor Vehicle Mfrs.*, 463 U.S. at 42, 103 S. Ct. 2856.

D.

Finally, the performance standard governs because it is more specific. It is a basic principle of regulatory interpretation that a regulation dealing with a "narrow, precise, and specific subject is not submerged" by a later enacted regulation "covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L.Ed.2d 540 (1976), *cited in Cal. ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000). Unlike the fill rule, which pertains to fill material generally, the performance standard covers froth-flotation mills precisely. *See* 40 C.F.R. § 440.104. Consequently, the agencies' later promulgation of the more general fill rule cannot supersede the narrow, precise, and specific performance standard for froth-flotation mills.

E.

The Corps also issued a permit to Goldbelt, Inc., for construction of a marine terminal facility at Cascade Point and issued a ROD approving Goldbelt's plan of operations. *See* U.S. Army Corps of Eng'rs, Permit to Goldbelt, Inc. (July 15, 2005); U.S. Army Corps of Eng'rs, Revised ROD 4 (Mar. 29, 2006). Goldbelt's permit and ROD are predicated on a mine design of which a critical component is Coeur Alaska's discharge of process wastewater into Lower Slate Lake. But for that mine design, the Cascade Point facility would be unnecessary. In fact, the Corps itself stated that "without Kensington mine, the Cascade Point facility would not be constructed in the foreseeable future." U.S. Army Corps of Eng'rs, Revised ROD 4. For that reason, the Corps considered the terminal a "component" of the Kensington project and analyzed the terminal proposal in the same Final Supplemental Environmental Impact Statement and Revised ROD as the Kensington project. *Id.* Indeed, Goldbelt must have had a "significantly protectable interest" relating to the subject of this case in order to intervene as a defendant, which it chose to do. *United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002); Fed. R. Civ. P. 24(a)(2). Importantly, in its motion to intervene, the company admitted that "Goldbelt's Cascade Point marine terminal is an integral part of the approved Plan of Operations, and may be constructed and used *solely* to service the Kensington Mine as contemplated in that Plan of Operations." Goldbelt further admitted that "[a]ny ruling by this Court that delays or disrupts construction of the mine will leave Goldbelt with a 'permitted' facility that either it cannot build or cannot be operated once built because the condition precedent of Goldbelt's permits is construction and operation of

the Kensington Mine as contemplated in the challenged Plan of Operations." Consequently, Goldbelt's permit and ROD are critically premised on Coeur Alaska's § 404 permit. Because that permit is invalid, the Corps' permit and ROD for the Cascade Point facility should be vacated.

F.

Under the APA, the normal remedy for an unlawful agency action is to "set aside" the action. 5 U.S.C. § 706(2). In other words, a court should "vacate the agency's action and remand to the agency to act in compliance with its statutory obligations." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005), *cert. granted*, --- U.S. ----, 127 S. Ct. 853, 166 L.Ed.2d 681 (2007); *see also Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). For the reasons discussed above, the Corps' permit for the discharge of process wastewater from the froth-flotation mill at the Kensington Gold Mine into Lower Slate Lake violates § 301 and § 306 of the Clean Water Act. The Corps' permit for construction of a marine terminal at Cascade Point critically depends on the unlawful permit to Coeur Alaska. Consequently, we remand to the district court to vacate both permits, as well as the RODs on which they are based.

V.

In conclusion, we reverse the district court, remand to the district court to vacate the permits issued to Coeur Alaska and Goldbelt, and vacate the RODs that approved Coeur Alaska's and Goldbelt's plans of operations. The Corps violated the Clean Water Act by issuing a permit to Coeur Alaska for discharges of slurry from the froth-flotation mill at the Kensington Gold Mine. EPA's performance standard for froth-flotation mills, promulgated pursuant to § 301 and

§ 306 of the Clean Water Act, prohibits discharges from such operations into the navigable waters of the United States. No exceptions are provided by either the regulation or the statute. Even though the discharge in this case facially qualifies for the permitting scheme under § 404 of the Clean Water Act because it will change the bottom elevation of Lower Slate Lake, the discharge is nevertheless prohibited by the clearly applicable and specific performance standard. The plain language and structure of the Clean Water Act demonstrate that EPA's performance standard governs in this case. Also, the agencies' statements made during promulgation of the regulation defining "fill material," as well as their statements made to Coeur Alaska during the lengthy permitting process, indicate that they intended this result.

Thus, the district court erred in granting summary judgment in favor of the defendants. The case is remanded to the district court for action pursuant to this opinion.

REVERSED and REMANDED.

APPENDIX Z

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendants-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

The panel has voted to deny the Federal Appellees' Petition for Limited Panel Rehearing.

Judge Graber has voted to deny the petitions for rehearing en banc of Intervenor-Appellee Goldbelt, Inc., Intervenor-Appellee Coeur Alaska, Inc., and Appellee State of Alaska. Judge Hug and Judge Tashima have voted to recommend denial of the petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petitions for rehearing en banc are DENIED.

Filed: October 29, 2007

APPENDIX AA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Appellee's motion to stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari is GRANTED. The stay shall continue until final disposition by the Supreme Court.

Filed: November 14, 2007

APPENDIX AB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Our court, having granted the stay of mandate in this case, now grants the suggested alternative in appellants' motion and directs Coeur Alaska, Inc., the Army Corps of Engineers, and the Forest Service to prepare and approve a reclamation plan by no later than April 1, 2008. Any motion for an extension of the deadline must be timely made, indicate whether plaintiffs-appellants oppose or agree to the request, and fully justify any period of extension requested.

Filed: November 26, 2007

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
SEP 17 2008
OFFICE OF THE CLERK

(12) (1)
Nos. 07-984 and 07-990

IN THE
Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER COEUR ALASKA, INC.

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QUESTION PRESENTED

Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for discharges of "fill material" provided that the discharges comply with that section's water-quality requirements, which are jointly developed by the Corps of Engineers and the Environmental Protection Agency. 33 U.S.C. § 1344(a), (b)(1). By regulation, the Corps of Engineers and EPA have jointly defined "fill material" generally as any material that has the net effect of raising the bottom elevation of a water of the United States, including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)–(f); 40 C.F.R. § 232.2.

In this case, the Ninth Circuit held that the Corps of Engineers lacked authority under Section *404* to issue a permit for the discharge of fill material whenever the discharge implicates any effluent restriction promulgated by EPA as part of its permit program under Section *402* of the Act. On that basis, the Ninth Circuit invalidated a Section 404 discharge permit issued to Petitioner Coeur Alaska, Inc.

The question presented is whether the Ninth Circuit erred in rejecting the expert agencies' joint interpretation of the Act that effluent restrictions promulgated as part of EPA's Section 402 permit program do not apply to discharges of fill material permitted by the Corps of Engineers under Section 404.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to Southeast Alaska Conservation Council, the Sierra Club and Lynn Canal Conservation were appellants in the court of appeals. In addition to Coeur Alaska, Inc. and to the State of Alaska, which is the petitioner in No. 07-990, the following parties (or their predecessors in office, *see* this Court's Rule 35.3) were appellees in the court of appeals and are respondents in this Court pursuant to this Court's Rule 12.6: the United States Army Corps of Engineers; Kevin J. Wilson, in his official capacity as District Engineer; Michael Rabbe, in his official capacity as Chief of the Regulatory Branch; George S. Dunlop, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); the United States Forest Service; and Goldbelt, Inc.[1]

The corporate disclosure statement included in Coeur Alaska's petition for a writ of certiorari remains accurate.

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[1] Kevin J. Wilson replaced Timothy J. Gallagher as District Engineer, Michael Rabbe replaced Larry L. Reeder as Chief of the Regulatory Branch, and George S. Dunlop replaced Dominic Izzo as Principal Deputy Assistant Secretary of the Army (Civil Works).

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS AND REGULATIONS INVOLVED 1

STATEMENT 2

SUMMARY OF ARGUMENT 11

ARGUMENT 15

I. THE NINTH CIRCUIT'S HOLDING THAT COEUR'S SECTION 404 DISCHARGE PERMIT VIOLATES THE CLEAN WATER ACT IS PLAINLY ERRONEOUS 15

A. The Corps Appropriately Issued A Section 404 Permit To Coeur For Its Discharge Of Fill Material 16

B. The Ninth Circuit Incorrectly Held That The Corps' Permit Violated Sections 301 and 306 of the Clean Water Act 22

II. THE NINTH CIRCUIT ERRED BY REJECTING THE CORPS' CONSTRUCTION OF ITS OWN RULE 32

A. The Ninth Circuit Disregarded The Text Of The Fill Rule 33

B. The Regulatory History Confirms That Effluent Restrictions Do Not Apply To Discharges Of Fill Material, Including Mine Tailings 35

C. The Corps Has Long Regulated Discharges Of Mine Tailings As Fill Material 39

TABLE OF CONTENTS—CONTINUED

Page

CONCLUSION 44

APPENDIX: Relevant Provisions of the Clean Water Act and Regulations Involved 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins, 519 U.S. 452 (1997) 32

Bates v. United States, 522 U.S. 23 (1997).....27

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).....32, 33, 35

Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002).....43

E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977).....23, 26

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).....23

Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147 (2008).....34

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004).....24

HCSC-Laundry v. United States, 450 U.S. 1 (1981).....28

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993).....38

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 24

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991).....43

Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007).....43

TABLE OF AUTHORITIES—CONTINUED

Page(s)

Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) 13, 28

Officemax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005).....25

Perrine v. Chesapeake & Del. Canal Co., 50 U.S. 172 (1850).....25

Rapanos v. United States, 547 U.S. 715 (2006).....24

Russello v. United States, 464 U.S. 16 (1983) 38

S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370 (2006).....13, 27

Slodov v. United States, 436 U.S. 238 (1978).....25

Townsend v. Little, 109 U.S. 504 (1883).....28

Udall v. Tallman, 380 U.S. 1 (1965).....34

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988).....12

United States v. Fisk, 70 U.S. 445 (1866).....25

United States v. Locke, 471 U.S. 84 (1985).....14, 34

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).....38

Statutes

33 U.S.C. § 407a 40

33 U.S.C. § 1251 15

33 U.S.C. § 1311(a).....2, 15, 29

TABLE OF AUTHORITIES—CONTINUED

Page(s)

33 U.S.C. § 1311(e) 2

33 U.S.C. § 1316(e) 2, 13, 23

33 U.S.C. § 1342(a) ..... passim

33 U.S.C. § 1342(k) 29

33 U.S.C. § 1343(c) 44

33 U.S.C. § 1344(a) 2, 11, 16

33 U.S.C. § 1344(b) 2, 26, 29

33 U.S.C. § 1344(c) 3

33 U.S.C. § 1344(d) 2

33 U.S.C. § 1344(f) 3, 27, 29

33 U.S.C. § 1344(h)(1)(A) 29

33 U.S.C. § 1344(p) 3, 29

33 U.S.C. § 1344(r) 3

Regulations

33 C.F.R. § 320.4 18

33 C.F.R. § 323.2(e) 17, 32, 35, 38

33 C.F.R. § 323.2(f) ..... passim

33 C.F.R. § 323.6 18

40 C.F.R. § 122.3(b) 4, 25, 43

40 C.F.R. § 125.4(d) (1973) 4, 25

40 C.F.R. pt. 230 18

40 C.F.R. § 232.2 ..... 5, 17

40 C.F.R. § 401.11(i) 23

TABLE OF AUTHORITIES—CONTINUED

Page(s)

40 C.F.R. § 434.10 42

40 C.F.R. § 440.102(a) 40, 41

40 C.F.R. § 440.104(b)(1) 40

Other Authorities

Coal Mining Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 50 Fed. Reg. 41,296 (1985) 42

Environmental Permit Regulations, 48 Fed. Reg. 14,153 (1983) 4

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816 31

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (2002) ..... passim

H. Rep. No. 95-139 (1977) 37, 40

Hearings on H.R. 11896 Before the H. Comm. on Public Works, 92 Cong. 308 (1971) 30, 31

Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794 (1982) 41, 42

Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (1982) 40

TABLE OF AUTHORITIES—CONTINUED

Page(s)

Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292 (2000) 3, 4, 5, 37

Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092 (2007) 41

S. 2770, 92d Cong. § 402 (1971) 30

S. Rep. No. 92-1236 (1972) (Conf. Rep.) 30

Senate Consideration of the Report of the Conference Committee on Amendment of the Federal Water Pollution Control Act (Oct. 4, 1972) 31

Senate Debate on S. 2770 (Nov. 2, 1971) 30

S. Ct. R. 24.1(f) 1

BRIEF FOR PETITIONER COEUR ALASKA, INC.

OPINIONS BELOW

The court of appeals' opinion is reported at 486 F.3d 638. J.A. 517a. The order denying the petition for rehearing en banc is unreported. *Id.* 552a. The court of appeals' order granting respondents' emergency motion for an injunction pending the appeal is unreported, *id.* 509a, as is its order denying Coeur Alaska's motion to vacate that injunction, *id.* 511a. The opinion of the United States District Court for the District of Alaska is also unreported. *Id.* 478a.

JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on May 22, 2007, and it denied, on October 29, 2007, the timely filed petition for rehearing en banc of Coeur Alaska, Inc. ("Coeur"). Coeur's petition for a writ of certiorari was filed on January 28, 2008, and granted on June 27, 2008, along with the related petition of the State of Alaska. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The text of the pertinent provisions of the Clean Water Act, 33 U.S.C. §§ 1257–1387, and the regulations interpreting and administering the Act are set out in an appendix to this brief, *infra*, at 1a. *See* S. Ct. R. 24.1(f). The pertinent provisions are: 33 U.S.C. §§ 1311, 1316, 1342, and 1344; 33 C.F.R.

§ 323.2; and 40 C.F.R. §§ 122.3, 232.2, 401.11, 434.10, 440.102, and 440.104.

STATEMENT

1. Section 301 of the Clean Water Act broadly prohibits the discharge of pollutants into navigable waters of the United States "[e]xcept as in compliance with" certain of its provisions, including Sections 301, 306, 402, and 404. 33 U.S.C. § 1311(a). Section 402 authorizes EPA to "issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). Discharges that fall under Section 402—also known as the National Pollution Discharge Elimination System ("NPDES") program—must meet "all applicable requirements" under Sections 301, 306, and several other provisions of the Clean Water Act. *Id.* Section 301(e) requires compliance with "[e]ffluent limitations" applicable to existing point sources, *id.* § 1311(e), while Section 306(e) applies more stringent effluent restrictions, known as "standards of performance," to new point sources, *id.* § 1316(e). These effluent restrictions are promulgated in the form of regulations issued by EPA. The Section 402 NPDES permit scheme applies to all discharges into the navigable waters "[e]xcept as provided in section[] . . . [404]." 33 U.S.C. § 1342(a)(1).

Section 404 of the Clean Water Act entrusts to the Corps of Engineers the authority to "issue permits . . . for the discharge of . . . fill material into the navigable waters." 33 U.S.C. § 1344(a); *see also id.* § 1344(d). Discharges of fill material governed by Section 404 must satisfy water-quality requirements (known as Section 404(b)(1) guidelines) developed by EPA, in consultation with the Corps, under criteria established by Congress. *Id.* § 1344(b) (cross-referencing criteria in 33 U.S.C. § 1343(c)). More-

over, Section 404(c) provides an additional protection for water quality by stating that EPA may veto any permit the Corps proposes to grant. *Id.* § 1344(c). Section 404 does not, however, require compliance with effluent limitations or standards of performance promulgated by EPA under its Section 402 NPDES permit program. Indeed, the only references in Section 404 to either Section 301 or Section 306 are two provisions—Section 404(f) and Section 404(r)—that state that certain discharges of fill material are "not prohibited by or otherwise subject to regulation" under Section 301, and another—Section 404(p)—that states that compliance with a Section 404 discharge permit "shall be deemed compliance" with Section 301. 33 U.S.C. § 1344(f), (p), (r). Section 306 is not mentioned at all.

The division of labor Congress prescribed in Sections 402 and 404 makes sense. As EPA and the Corps have explained, "[i]n keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, sections 404 and 402 employ different approaches to regulating the discharges to which they apply." Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,293 (Apr. 20, 2000). The Section 402 program focuses on "water quality standards for the receiving water" and controls pollutant discharges "principally through the imposition of effluent limitations, which are restrictions on the 'quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters.'" *Id.* "Fill material," on the other hand, "differs fundamentally from the types of pollutants covered by section 402 because the princi-

pal environmental concern is the loss of a portion of the water body itself." *Id.* "The term 'fill material' clearly contemplates material that fills in a water body." *Id.*

Consistent with Congress's intention to make these permitting regimes mutually exclusive, *see* 33 U.S.C. § 1342(a) ("Except as provided in section[] . . . [404]"), EPA has long provided that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require [EPA] NPDES permits" under Section 402 of the Act. 40 C.F.R. § 122.3(b) (promulgated at Environmental Permit Regulations, 48 Fed. Reg. 14,153, 14,157–58 (Apr. 1, 1983)); *see also* 40 C.F.R. § 125.4(d) (1973) (earlier regulation providing that "fill material discharged into navigable waters" does "not require an NPDES permit"). Both EPA and the Corps, moreover, have affirmed that "EPA has never sought to regulate fill material under effluent guidelines." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002).

Because the term "fill material" is not defined by the Clean Water Act, these agencies, acting within the discretion delegated to them by Congress, issued a joint regulation (the "Fill Rule") to "determine[] the basic jurisdiction of the section 404 versus the section 402 program." Final Revisions, 67 Fed. Reg. at 31,133. EPA and the Corps chose to define the Fill Rule's "key jurisdictional terms" by using an "objective, effects-based test that ensures consistent treatment of like discharges" and that "prevents uncertainty for the regulated community as to what regulatory program applies to particular discharges." *Id.*; *see also* Proposed Revisions, 65 Fed. Reg. at

21,293 ("Providing a clear and consistent definition for the term 'fill material' . . . is important in determining whether a proposed discharge of a pollutant is subject to regulation under section 404 or section 402.").

In the Fill Rule, the agencies defined "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii); 40 C.F.R. § 232.2. The agencies further provided that the term "discharge of fill material" "generally includes . . . placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.

The discharge at issue in this case is the placement of mine tailings, transported as a slurry, into Lower Slate Lake in southeastern Alaska, where, all agree, the tailings would "raise the bottom elevation of the lake by 50 feet." J.A. 519a.

2. The Kensington Gold Mine is located about 45 miles north of Juneau, Alaska, at the site of a mine previously operated from 1897 to 1928. Coeur's plan of operations for reinvigorating the mine provides for conventional milling of ore on site through a "froth-flotation" process that separates valuable ore from the remaining minerals. Under this process, crushed ore is fed into flotation tanks where air, conditioners, and frothing agents cause gold-bearing minerals to attach to air bubbles and float to the top of the tank. The gold-bearing froth is then skimmed off and further concentrated in additional flotation tanks. Most of the chemicals added in the froth-flotation process and most other metals naturally occurring in the gold-bearing ore will be removed with the froth con-

centrate or will remain in the flotation tanks. J.A. 481a–82a, 191a.

The remaining tailings—finely ground, solid material resembling wet sand, C.A. E.R. 77[1]—will then be removed from the flotation tanks and, after the addition of settling agents that "are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the settling of the fine material," J.A. 482a n.15, transported in a slurry form via a 3.5-mile pipe into a secure impoundment in Lower Slate Lake. Over the 10- to 15-year life of the project, the mill processing operations will yield a great deal of valuable ore, but also several million tons of mine tailings. Approximately 40 percent of the tailings can be backfilled into the mine. *Id.* 520a. Coeur proposed disposing of the remainder—up to 4.5 million tons—by placing them into a carefully designed impoundment in Lower Slate Lake. Coeur also developed a reclamation plan designed to restore the lake's fish population at the close of operations. J.A. 249a. Because the largely solid mine tailings constitute "fill material" (the tailings indisputably would "[c]hang[e] the bottom elevation" of the lake, 33 C.F.R. § 323.2(e)(1)(ii)), Coeur sought a permit from the Corps under Section 404.

The Corps thoroughly considered both Coeur's proposed discharge and several alternative methods of tailings storage. After taking into account the input of several other agencies (including Environmental Impact Statements prepared by the Forest Service in cooperation with the Corps, EPA, and the

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[1] "C.A. E.R." refers to the Excerpts of Record filed in the court of appeals. "C.A. J.S.E.R." refers to the Joint Supplemental Excerpts of Record also filed in the court of appeals.

Alaska Department of Natural Resources, and a Record of Decision by the Forest Service), the Corps ultimately approved the use of a tailings impoundment in the Lower Slate Lake. The Corps' Record of Decision concluded that the tailings impoundment was "the least environmentally damaging practicable alternative." J.A. 366a. The Corps also determined that the principal alternative proposal, storing the mine tailings in a dry tailings facility, would be "more damaging" than depositing them in Lower Slate Lake because upland disposal would cause a "permanent loss of wetland[s]" that would "outweigh[] the temporary losses to the lake." *Id.* Evaluating Coeur's proposed discharge, the Corps concluded that it satisfied the Section 404(b)(1) water-quality requirements promulgated by EPA in consultation with the Corps. By granting the Section 404 permit, which incorporated numerous protective requirements under Section 404(b)(1) guidelines, the Corps authorized Coeur to discharge tailings into Lower Slate Lake. *Id.* 266a–86a.

The Alaska Department of Environmental Conservation certified that the proposal would comply with Section 401 of the Act and with Alaska's water-quality standards. J.A. 368a. Recognizing the clear fill effect of the tailings discharge into the Lower Slate Lake impoundment, EPA concurred with the Corps that Section 404 was the applicable permitting regime, that, accordingly, Section 301 and Section 306 effluent restrictions did not apply, and that Coeur's proposed discharge satisfied EPA's Section 404(b)(1) water-quality requirements. After reviewing multiple analyses and working with the Corps to resolve environmental concerns, EPA concurred in the Corps' issuance of the permit, declining to exercise its ultimate veto authority under Section 404(c).

EPA also issued a Section 402 permit, incorporating standards of performance promulgated under Section 306, to govern the subsequent discharge of effluent from the lake impoundment into the small adjacent creek leading to more substantial downstream waters. J.A. 287a, 292a, 317a.

3. Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") sued the Corps of Engineers and the Forest Service, arguing that the issuance of Coeur's Section 404 permit for the discharge of fill material violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), and Sections 301(a), 301(e), and 306(e) of the Clean Water Act. SEACC relied on an EPA regulation that states that "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores," 40 C.F.R. § 440.104(b)(1), and argued that this "no discharge" performance standard (promulgated under Section 306) precluded any disposal of mine tailings under a Section 404 permit.

SEACC alternatively challenged the agencies' construction of their own joint regulatory definition of "fill material," arguing that it was arbitrary and capricious to construe the term "discharge of fill material"—a term which the Fill Rule explicitly provides "includes . . . placement of . . . slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2—to include the proposed Kensington mine tailings slurry. J.A. 475a ¶ 72. SEACC did not challenge the validity of the Fill Rule itself or its definition of Section 404's ambiguous statutory term "fill material." Rather, it rested its argument on the contention that the Fill Rule could

not reasonably be interpreted to apply to Coeur's particular discharge of mine tailings.

After Coeur, the State of Alaska, and Goldbelt intervened in defense of the Corps' issuance of the Section 404 permit, the district court granted the defendants' motion for summary judgment and upheld the permit, holding that "[t]he Corps properly issued the permit to Coeur Alaska, Inc. under § 404." J.A. 495a. The district court recognized that the Clean Water Act "divides the permitting process into two segments" and that different standards apply under Sections 402 and 404, *id.* 490a–91a; accordingly, the district court concluded that "[i]f the permit was properly issued under § 404, [the effluent limitations of Sections 301(e) and the standards of performance of 306(e)] are inapplicable," *id.* 488a n.35. The district court also rejected SEACC's argument that statements in the regulatory history rendered unreasonable the agencies' interpretation of their own Fill Rule to permit a discharge that "facially falls within the definition of 'fill material' contained in the regulations." *Id.* 492a.

4. The Ninth Circuit issued an emergency injunction pending appeal, J.A. 509a–10a, and thereafter reversed the judgment of the district court and invalidated Coeur's Section 404 permit. The court of appeals concluded that the Corps, by issuing a permit to Coeur for a discharge that "facially meets the Corps' current regulatory definition of 'fill material,'" *id.* 526a, and that "facially qualif[ies] for permitting under § 404," *id.* 531a, had nevertheless "violated the Clean Water Act," *id.* 550a.

The court of appeals purported to base its conclusion on "the plain language of the Clean Water Act." J.A. 526a. The court contended that Section 301(a)

"prohibits all discharges of any pollutant . . . except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404." *Id.* 527a–28a. Relying on Section's 301's "use of 'and' as a connector," the court concluded that "§ 301(a) prohibits *any* discharge that does not comply with . . . both § 301 and § 306, as well as § 402 and § 404." *Id.* 531a. Thus, the court concluded that "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." *Id.* 533a. "[T]he NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for [such] discharges." *Id.* 533a–34a.

The court also argued that the use of "all" and "any" in Sections 301(e) and 306(e) meant that effluent restrictions promulgated by EPA applied to all discharges, even those permitted by the Corps under Section 404. J.A. 531a. The Ninth Circuit reached that conclusion despite the fact that discharges permitted by Section 404 must comply with a different set of EPA water-quality standards—the Section 404(b)(1) guidelines.

The court also proffered an alternative holding that, even though Coeur's proposed discharge "facially meet[s] the definition of the term 'fill material,'" J.A. 538a, the "regulatory history" nonetheless demonstrated that the Corps had unreasonably interpreted its own regulation as encompassing Coeur's discharge. *Id.* 535a. The regulation's plain language notwithstanding, the panel concluded that the regulation must be interpreted to include "only . . . those tailings and other mining-related materials

that are not subject to effluent limitations or standards of performance." *Id.* 546a.

5. The court of appeals denied rehearing, J.A. 553a, but, on Coeur's motion, stayed its mandate pending review by this Court. *Id.* 554a. After granting the stay, however, the court of appeals issued another order, this time on SEACC's motion, to require Coeur, the Corps, and the Forest Service to prepare and approve a reclamation plan by April 1, 2008. *Id.* 555a.

SUMMARY OF ARGUMENT

Even though Section 404 of the Act broadly authorizes the Corps of Engineers—and only the Corps of Engineers—to issue permits "for the discharge of . . . fill material," 33 U.S.C. § 1344(a), and even though the joint EPA-Corps Fill Rule—unchallenged here—defines "fill material" generally as any material that has the net effect of raising the bottom elevation of a navigable water (including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f)), the Ninth Circuit held that the Corps lacks authority to issue a permit for the discharge of fill material whenever the proposed discharge implicates any of the hundreds of effluent restrictions promulgated by EPA. The Ninth Circuit offered two alternative rationales for its conclusion, and both are clearly erroneous.

1. The Ninth Circuit first held that, in issuing a Section 404 permit to Coeur for the discharge of fill material, the Corps contravened the text of the Clean Water Act. On the Ninth Circuit's view, the Act requires that, if an EPA effluent restriction could conceivably be applied to a discharge (even a discharge of fill material), it may be permitted only under EPA's Section 402 NPDES program. Section 404,

however, gives the Corps a clear mandate and unambiguous instructions with respect to the issuance of permits for the discharge of fill material, and there is no dispute here that the Corps followed the commands of Section 404 to the letter. After the Corps, EPA, the Forest Service, and several other federal and state agencies reviewed the effects of Coeur's proposed discharge, the Corps applied EPA's Section 404(b)(1) water-quality requirements and found them satisfied. EPA concurred, finding no basis to invoke its authority under Section 404(c) to veto the Corps' decision to issue an permit.

But Section 404 played no role whatsoever in the Ninth Circuit's analysis of the Corps' permitting authority. It instead concluded that, whatever the Corps' authority under Section 404, Section 301(a) and Section 306(e) of the Act precluded the Corps from issuing a permit for Coeur's proposed discharge. But statutory interpretation is a "holistic endeavor," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and the Ninth Circuit's construction of those two subsections cannot be reconciled with the whole of the Clean Water Act.

The Ninth Circuit read Section 301(a) as requiring—because it uses the word "and"—that every discharge into jurisdictional waters comply with both Section 301 *and* Section 306, as well as both Section 402 *and* Section 404. That reading of the conjunction, however, disregards the fact that it conjoins two pairs of mutually exclusive provisions: Section 301 applies to existing sources, while Section 306 applies only to new sources, and Section 404 applies only to fill material, while Section 402 applies to "any pollutant" "[e]xcept as provided in section[] . . . [404]." 33 U.S.C. § 1342(a). In that statutory context, "and"

can be sensibly construed only as a disjunctive. The Ninth Circuit seemed to admit as much when it treated the Section 402 NPDES program and the Corps' Section 404 program as mutually exclusive permitting alternatives.

The Ninth Circuit also contended that, because EPA has promulgated a standard of performance applicable to froth-flotation mining operations, Section 306(e), which makes it "unlawful for any . . . operator of any new source to operate such source in violation of any standard of performance applicable to such source," 33 U.S.C. § 1316(e), precluded the Corps from permitting Coeur's discharge of fill material. Buried in the Ninth Circuit's reasoning is an assumption that effluent restrictions promulgated by EPA under Section 301 and Section 306 apply to discharges of fill material, but reading the statute as a whole demonstrates that they do not. Section 404 specifically enumerates the water-quality requirements that apply to discharges of fill material and, in vivid contrast to Section 402, does not require compliance with EPA effluent restrictions. Congress's affirmative decision to impose different standards under Sections 404 and 402 must be given effect. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006). Moreover, if, as the Ninth Circuit stated, Sections 301(e) and 306(e) are "blanket prohibitions" that apply broadly and generally to "*all*" and "*any*" discharges, and Section 404 is a "limited" program that applies "only to dredged or fill material," J.A. 530a–32a, then, to the extent that the general rules of Sections 301(e) and 306(e) conflict with the specific rules of Section 404, Section 404's specific rules would control. *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002).

II. Backstopping its tendentious reading of isolated provisions of the Act, the Ninth Circuit held, in the alternative, that the Corps unreasonably interpreted its own regulation when it concluded that Coeur's proposed discharge of mine tailings fell within the regulatory definition of "fill material" set out in the joint EPA-Corps Fill Rule. Although the Ninth Circuit conceded that Coeur's proposed placement of tailings "facially meets" the Fill Rule's definition of "fill material," J.A. 526a, after reviewing the "regulatory history" the Ninth Circuit concluded, the text of the Fill Rule notwithstanding, that EPA and the Corps did not intend to include within their definition of "fill material" discharges that otherwise could be covered by an EPA effluent restriction. This Court has held, however, that an agency's construction that is consistent with plain *statutory* language "simply cannot be found 'sufficiently unreasonable' as to be unacceptable," *United States v. Locke*, 471 U.S. 84, 96 (1985), and this rule applies with even greater force when, as here, the agency is interpreting not a statute, but a *regulation* it wrote. And while the text of the Fill Rule is dispositive of any question concerning the reasonableness of the Corps' application of the regulation to Coeur's proposed discharge, the regulatory history further demonstrates that the Fill Rule applies to "*any* mining-related material that has the effect of fill when discharged," Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added), not, as the Ninth Circuit held, to "*only* . . . mining-related materials . . . not subject to effluent limitations," J.A. 546a (emphasis added). Indeed, the relevant "history" is that "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

In a case in which the validity of the Fill Rule was unchallenged, the Ninth Circuit effectively rewrote the regulation. It scrapped the jurisdictional line drawn by Congress in Section 404(a)—and clearly defined with objective criteria by the agencies in the Fill Rule—and replaced it with its own policy: an outright grant of primary jurisdiction to EPA, under which EPA regulates whatever discharges it chooses and the Corps regulates "fill material" only to the extent that EPA chooses not to do so. That is not what either Congress or the agencies intended. The decision of the court of appeals should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING THAT COEUR'S SECTION 404 DISCHARGE PERMIT VIOLATES THE CLEAN WATER ACT IS PLAINLY ERRONEOUS

The Clean Water Act protects the "chemical, physical and biological integrity of the Nation's waters" by permitting discharges into jurisdictional waters only if they comply with certain provisions of the Act. 33 U.S.C. §§ 1251 & 1311(a). The expert agencies tasked by Congress with applying the Act's two principal permitting regimes agree that the discharge at issue in this case falls squarely within the Section 404 program as a discharge of fill material. That conclusion could be rejected only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and to reach that result the Ninth Circuit announced an entirely novel construction of the Act: Effluent restrictions applicable under Section 402's general NPDES permit program henceforth would also apply to Section 404 permits, which govern specifically—

and only—discharges of fill material. The court's decision ignores the regulatory scheme of the Act, divorces particular terms from their context, and reads general provisions as trumping specific provisions. The court's decision cannot be reconciled with the Act or this Court's precedents.

A. The Corps Appropriately Issued A Section 404 Permit To Coeur For Its Discharge Of Fill Material

Section 404 of the Clean Water Act authorizes the Corps of Engineers to "issue permits . . . for the discharge of . . . fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). As the Ninth Circuit acknowledged, "[t]he Clean Water Act does not define the term 'fill material,'" J.A. 538a, and therefore the Corps and EPA, the two agencies responsible for the administration of the Clean Water Act, jointly defined the term after notice and comment. Neither SEACC nor the Ninth Circuit disputes the agencies' authority to interpret the undefined and ambiguous statutory term "fill material," nor do they dispute that the joint EPA-Corps definition of "fill material" is reasonable. J.A. 541a n.12 (explaining that because SEACC attacked only the Corps' application of its Fill Rule, and not the Fill Rule itself, "we do not reach the issue of the validity of these regulations"). As the agencies explained when promulgating the Fill Rule, the definitions provide an "objective effects-based test" that "determines the basic jurisdiction of the section 404 versus the section 402 program," "ensures consistent treatment of like discharges," and "prevents uncertainty for the regulated community as to what regulatory program applies to particular discharges." Final Revisions, 67 Fed. Reg. at 31,133. Under this jurisdic-

tional division, "EPA has never sought to regulate fill material under effluent guidelines." *Id.* at 31,135.

In their joint regulation, the agencies defined "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii) (Corps); 40 C.F.R. § 232.2 (EPA). They further defined "discharge of fill material" to include "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f) (Corps); 40 C.F.R. § 232.2 (EPA).

The proposed discharge in this case falls squarely within these definitions: The district court noted that "it is uncontested that the slurry to be discharged into Lower Slate Lake will 'change the bottom elevation' of the lake," J.A. 492a, and the Ninth Circuit agreed that "[t]he discharge . . . facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake," *id.* 526a. Indeed, the Ninth Circuit acknowledged that Coeur's proposed discharge of mine tailings will raise the bottom elevation of Lower Slate Lake by *50 feet*. *Id.* 519a.

Relying on Section 404 and on the Fill Rule's reasonable regulatory interpretation of that statute, both of which grant primary jurisdiction over discharges of fill material to the Corps, Coeur applied in 2001 to the Corps for a permit under Section 404 for its proposed tailings discharge into Lower Slate Lake, as part of an amended plan of operations for the Kensington Mine Project. J.A. 210a. Although the mine project had already undergone, in the words of the Corps in 1998, "intense public and

agency scrutiny for eight years," C.A. E.R. 255, Coeur's amended plan of operations and Section 404 permit application underwent another five years of agency review.

According to Corps regulations, applications for any type of permit from the Corps (including a Section 404 permit) must undergo (1) a public interest review; (2) an analysis of the proposal's effect on wetlands, which may include review by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service; (3) a fish and wildlife analysis; (4) a water-quality review; (5) an evaluation of historic, cultural, scenic, and recreational values; (6) a review of other federal, state, or local requirements; (7) an evaluation of the safety of impoundment structures; (8) consideration of any environmental benefits from the proposal; (9) a review of the proposal's economic impact; and (10) an analysis of any mitigating steps taken by the permittee. 33 C.F.R. § 320.4; *see also id.* § 323.6. In addition, applicants for a Section 404 permit must comply with the water-quality requirements of Section 404(b)(1), which address potential impacts on the physical and chemical characteristics of the aquatic ecosystem, on special aquatic sites (including wetlands), and on human use and which consider how to minimize any adverse effects from the proposal. 40 C.F.R. pt. 230. Coeur's amended plan of operations satisfied all of these requirements.

The review of Coeur's amended plan of operations began when the Forest Service, in cooperation with the Corps, EPA, and the State of Alaska, held public meetings and then prepared a Supplemental Environmental Impact Statement (to update prior statements prepared in 1992 and 1997). J.A. 210a–11a, 228a–29a. The agencies made a draft of the

Environmental Impact Statement available for public comment, and held additional public meetings to discuss it. *Id.* 230a. The Forest Service also prepared a Record of Decision for the mining project, addressing the Lower Slate Lake tailings facility and other project components and environmental issues. J.A. 207a–48a. The Corps conducted its own review of the project, aided by these Environmental Impact Statements, by the more than 900 individual reports that, at a cost of $26 million, have examined the potential environmental impact of the Kensington mine project, C.A. J.S.E.R. 800, and by public comments, including comments from public hearings in Alaska about the proposed permit. J.A. 369a. In addition to comments from the general public, the Corps considered comments from EPA, the National Marine Fisheries Service, other agencies, and from SEACC, *id.* 369–70a; *see also* C.A. J.S.E.R. 883, 888, 899. In response to these comments, Coeur agreed to take additional steps to protect water quality: For example, Coeur agreed to construct a reverse osmosis treatment facility for discharges from the lake impoundment into an outflowing creek and to use methods, such as silt screens, to confine suspended particles and turbidity to a small area in the lake. C.A. J.S.E.R. at 878, 880; *see also* J.A. 276a, 280a.

Evaluating the proposed discharge under the Section 404(b)(1) guidelines, the Corps determined that the proposed discharge would not violate State water-quality standards or toxic effluent standards (under Section 307 of the Act) and would not jeopardize endangered or threatened species or their critical habitat; the Corps also concluded that the discharge would not cause adverse impacts to human health or welfare, to the diversity, productivity, and stability of aquatic life and other wildlife or wildlife habitat, or

to recreational, aesthetic, and economic values. J.A. 384a–86a.

In accordance with Section 7 of the Endangered Species Act, the National Marine Fisheries Service reviewed the project, referring to the Forest Service's Supplemental Environmental Impact Statement, a biological assessment, and other studies. C.A. E.R. 478. After consulting with the Corps and the Forest Service, the Fisheries Service issued a Biological Opinion concluding that the project was not likely to jeopardize the continued existence of covered species or to adversely modify designated critical habitat. *Id.* The Alaska Department of Natural Resources similarly concurred that the project was consistent with the Alaska Coastal Management Plan. J.A. 369a. The Alaska Department of Environmental Conservation issued a certificate that the project would comply with Alaska's water-quality standards and program under Section 401 of the Act. *Id.* 368a.

Finally, in 2005, after Coeur submitted its final plan of operations and also a reclamation and closure plan, the Corps approved the Section 404 permit. J.A. 266a, 249a. EPA also issued a Record of Decision and a Section 402 permit to govern discharges *from* the tailings impoundment into downstream waters. J.A. 287a, 317a. In response to the initial filing of this lawsuit, the Corps further evaluated the project and, in 2006, issued a revised Record of Decision and reissued the Section 404 permit, again concluding that Section 404 was the appropriate permitting scheme and that its requirements had been satisfied. J.A. 342a.

In short, numerous state and federal agencies reviewed Coeur's proposal and its expected effects, *see, e.g.*, J.A. 227a–28a, and Coeur met every re-

quirement imposed by Section 404 and every additional requirement of the Corps, EPA, and other agencies participating in the permitting process. Following this comprehensive review, the Corps granted the Section 404 permit. J.A. 266a. As the issuance of the permit demonstrates, both the Corps and EPA agreed that the discharge of mine tailings into Lower Slate Lake was a permissible discharge of fill material under Section 404 of the Clean Water Act. In this case, SEACC challenged *none* of these agency findings except to contend that effluent restrictions promulgated by EPA under Sections 301 and 306 as part of its Section *402* permit program apply to discharges of fill material governed by Section 404 and, here, prohibit Coeur's proposed disposal of tailings.[2]

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[2] The Ninth Circuit alleged that the agencies "consistently informed Coeur Alaska that discharges from its froth-flotation mill would not be regulated as fill material under § 404." J.A. 546a. This erroneous version of the mine's history is based on three out-of-context quotations. First, the court cited a 1998 record of decision as stating that the Corps "'does not regulate the placement of tailings,'" *id.* 547a; *see also* C.A. E.R. 257, but it ignored the context: The proposal called for putting the tailings in a dry tailings facility (i.e., on dry land), not in a water of the United States. *See* C.A. E.R. 257. Second, the Ninth Circuit's statement that EPA informed Coeur Alaska in 2005—after the Section 404 permit was issued, J.A. 547a, 523a—that the froth-flotation performance standard applies to the mine is similarly off-point, *id.* 547a (citing a record of decision "for § 402 NPDES Permit"); *see also* J.A. 291a, for that statement applied to "the proposed discharge *from* the tailings storage facility (TSF) in Lower Slate Lake," J.A. 292a (emphasis added), which is subject to a separate Section 402 permit, not to the proposed tailings discharge *into* Lower Slate Lake, which is the subject of this case. Third, the court's reliance on a statement by a district engineer, J.A. 539a n.10, is misplaced because that memo

[Footnote continued on next page]

B. The Ninth Circuit Incorrectly Held That The Corps' Permit Violated Sections 301 and 306 of the Clean Water Act

The Ninth Circuit held that the Corps' issuance of a discharge permit "violate[d] § 301 and § 306 of the Clean Water Act." J.A. 550a. The court of appeals reached this holding first by reading the word "and" in Section 301(a) to require compliance with mutually exclusive provisions and then by reading Sections 301(e) and 306(e) as applying even to discharges of fill material governed by Section 404. Thus, the Ninth Circuit concluded, the Corps lacks authority to grant a permit for a discharge that facially qualifies as "fill material" under Section 404 whenever "EPA has adopted an effluent limitation or performance standard applicable" to the discharge. *Id.* 533a. The Ninth Circuit's analysis, however, disregarded the structure of the Act and eschewed well-established rules of interpretation.

1. To demonstrate that EPA's effluent restrictions apply to discharges of fill material, the Ninth Circuit locked onto the word "and" in Section 301(a). The court of appeals argued that "[t]he use of 'and' as a connector, instead of 'or,'" in Section 301(a) "indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for

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[Footnote continued from previous page]

randum merely sought "to elevate to the Washington level" a jurisdictional dispute, C.A. E.R. 176, and the response from Washington directed that "the potential impacts of the discharge of mine tailings must be considered[] within the context of the section 404 permit evaluation," C.A. J.S.E.R. 1062.

permitting under § 404." J.A. 531a; *see also id.* 528a (quoting Section 301(a) with emphasis on the word "and"). Because of this "and," every discharge, in the Ninth Circuit's view, must "comply with several enumerated sections, including both § 301 and § 306, as well as § 402 and § 404." *Id.* 531a. But "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Here, the Ninth Circuit's reading of the word "and" cannot be reconciled with the whole of the Clean Water Act.

Context demonstrates that Section 301(a) cannot be read to require that all discharges comply with "both § 301 and § 306" and with their "effluent limitations and standards of performance." J.A. 531a. The text of Section 306(e) states that only "new" sources—not existing ones—need comply with standards of performance. 33 U.S.C. § 1316(e). As this Court explained shortly after the passage of the Clean Water Act, Section 306 provides for the establishment of "standards of performance for *new* sources," while "Section 301(b) defines the effluent limitations that shall be achieved by *existing* point sources." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 120–21 (1977) (emphases added). EPA also interprets these provisions as applying only in the alternative, clarifying in a regulation that effluent limitations under Section 301(e) apply only to "point sources[] *other than new sources*." 40 C.F.R. § 401.11(i) (emphasis added). In fact, even the Ninth Circuit contradicted itself by recognizing that pollutant discharges are "subject to an effluent limitation under § 301 *or* a standard of performance under § 306." J.A. 534a (emphasis added).

Nor does context permit the word "and" in Section 301(a) to require, as the interpretation of the Ninth Circuit suggests, that one must obtain permits under both Section 402 *and* Section 404 for the same discharge. The plain text of Section 402 makes clear that it applies only when Section 404 does not. 33 U.S.C. § 1342(a)(1) ("Except as provided in . . . [Section 404]"). This Court recently recognized that Section 402 and Section 404 are mutually exclusive permitting schemes. *See Rapanos v. United States*, 547 U.S. 715, 744 (2006) (plurality opinion) (contrasting "pollutants normally covered by the permitting requirement of [Section 402(a)]" with "'dredged or fill material'" and explaining that "[t]he Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)]"); *id.* at 760 (Kennedy, J., concurring) ("*Apart from* dredged or fill material, pollutant discharges require a permit from [EPA], which also oversees the Corps' . . . permitting decisions.") (emphasis added). Numerous courts of appeals have similarly acknowledged this mutual exclusivity. *See, e.g., Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 (7th Cir. 2004) ("[A] defendant who wishes to discharge a pollutant must first obtain a permit *either* under [Section 404] for the discharge of dredged or fill material *or* under [Section 402] for other pollutants.") (emphases added).[3]

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[3] *See also Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003) (recognizing that "cross-references, exclusions, and vetoes" interlocking Sections 404 and 402 "reinforc[ed] the fill-effluent distinction that has been followed by the agencies").

Both agencies charged with administering the two permitting schemes agree that Section 301 requires compliance with only "one of the two permitting programs." Final Revisions, 67 Fed. Reg. at 31,130. Indeed, since 1973, EPA has recognized that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require NPDES permits." 40 C.F.R. § 122.3(b); 40 C.F.R. § 125.4(d) (1973). *SEACC itself* acknowledged below the mutual exclusivity of these two sections. SEACC C.A. Br. 24 ("The Act provides that a single discharge will be governed by either section 402 or section 404, but not both."). And in the end, even the Ninth Circuit could not accept the logical conclusion of its own reading of "and": It did not require that Coeur comply with both "§ 402 and § 404," J.A. 531a, but instead held that "§ 402 is the only appropriate permitting mechanism" for discharges subject to an effluent limitation, *id.* 533–34a.

This Court has long recognized that "courts are often compelled to construe '*or*' as meaning '*and*,' and again '*and*' as meaning '*or*.'" *United States v. Fisk*, 70 U.S. 445, 447 (1866); *see also Slodov v. United States*, 436 U.S. 238, 246–48 (1978) (interpreting "and" as "or" to avoid a result "obviously at odds with the statute's purpose"). This is a corollary to the more general rule that courts may not "take out of a statute a single word susceptible of different meanings[] and expound it without reference to the context." *Perrine v. Chesapeake & Del. Canal Co.*, 50 U.S. 172, 190 (1850). When the word "and" "conjoins a list of mutually exclusive alternatives," "context *requires* the term to be construed disjunctively." *Officemax, Inc. v. United States*, 428 F.3d 583, 591 (6th Cir. 2005) (Sutton, J.) (emphasis added).

Section 301(a) need not be construed to require every discharge to comply with mutually exclusive provisions—with Sections 301 *and* 306, and with Sections 402 *and* 404. Indeed, the *only* sensible construction of Section 301(a) is as a list of each of the provisions of the Act that regulate discharges into jurisdictional waters and a prohibition on discharges "[e]xcept as in compliance with" those regulatory provisions applicable to the particular discharge. Accordingly, this Court in *Du Pont* did not consider all sections listed in Section 301(a) as applicable to the discharge of effluent then before the Court, but instead considered only Sections 301, 306, and 402 as "relevant to [the] case." 430 U.S. at 119 (making no mention of Section 404).

2. The Ninth Circuit's conclusion that the Corps' Section 404 permit violated Sections 301(e) and 306(e) of the Act is just as flawed, contravening both the structure and the history of the Act.

a. The structure of the Act demonstrates that Sections 301 and 306 do not apply to discharges permitted under Section 404. Section 404 requires compliance with Section 404(b)(1) water-quality requirements, guidelines developed by EPA in consultation with the Corps, based on criteria specifically designated by Congress. *See* 33 U.S.C. § 1344(b) (requiring EPA guidelines to be "based upon criteria comparable to the criteria applicable . . . under [Section 403(c) of the Act]"). Section 404 makes no mention of Section 301(e)'s effluent limitations or of Section 306(e)'s standards of performance. Instead, it is Section 402 that requires that discharges of pollutants meet "all applicable requirements under sections [301] . . . [and 306]." *Id.* § 1342(a)(1). Congress affirmatively expressed its intent to impose different

requirements under the different permitting programs—compliance with Section 404(b)(1) guidelines under Section 404, and compliance with effluent restrictions (including standards of performance) under Section 402.

As this Court recently reiterated in another Clean Water Act case, "if 'Congress includes particular language in one section of a statute'"—as Congress did in Section 402, stating that Sections 301 and 306 apply under that section—"'but omits [that language] in another section of the same Act'"—as Congress did in Section 404—"'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *S.D. Warren*, 547 U.S. at 384 (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)). If concluding that Sections 301(e) and 306(e) do not apply under Section 404 is, as the Ninth Circuit characterizes it, a "negative inference," J.A. 531a, it is a negative inference expressly approved by this Court when construing the Clean Water Act.[4]

Moreover, the specific provisions of Section 404 are properly construed as creating an exception to the general obligations imposed by Sections 301(e)

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[4] The Ninth Circuit also thought Section 404(f) weighed against finding an exception in Section 404 from the requirements of Sections 301 and 306 because Congress insisted "in § 404(f) that even the discharges from the enumerated activities [for which there is an explicit exception] continue to be subject to effluent standards." J.A. 535a. Section 404(f), however, makes no mention of the effluent limitations or performance standards of Section 301(e) or Section 306(e), but instead specifically refers to a different set of standards—Section 307's "Toxic and pretreatment effluent standards," 33 U.S.C. § 1317—that are not at issue in this litigation. *See id.* § 1344(f).

and 306(e). It is well-established that "specific statutory language should control more general language when there is a conflict between the two." *Nat'l Cable*, 534 U.S. at 335; *see also Townsend v. Little*, 109 U.S. 504, 512 (1883) (explaining the "well-settled rule" that "general and specific provisions, in apparent contradiction . . ., may subsist together, the specific qualifying and supplying exceptions to the general"). The Ninth Circuit went out of its way to emphasize the broad language of Sections 301(e) and 306(e), describing these sections as imposing "blanket prohibitions" that apply to "*all*" and "*any*" discharges. J.A. 531a–32a. The court also specifically observed that, in contrast, "the permit scheme under § 404 is a *limited* permit program that applies *only* to dredged or fill material." *Id.* 530a–31a (emphases added). The court even relied, when addressing the allegedly conflicting regulations, on the canon of construction that the specific controls the general. *Id.* 548a (describing it as a "basic principle" of interpretation). The Ninth Circuit should have acknowledged, therefore, that to the extent the general prohibitions on discharges in Sections 301 and 306 appear to conflict with Section 404's specific exception that permits discharges of fill material as long as they comply with the water-quality requirements of Section 404(b)(1), Section 404 ought to control. *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . ., particularly when the two are interrelated and closely positioned, both in fact being parts of" the same statutory scheme.).

Sections 404(p) and 402(k) confirm this reading of the statute. These parallel provisions immunize holders of Section 404 or Section 402 discharge per-

mits from enforcement actions and citizen suits based on the permitted discharge, providing that compliance with the terms of the discharge permit "shall be deemed compliance" with substantive provisions and restrictions imposed by the Clean Water Act—but only the substantive provisions that apply to each type of discharge. Section 404(p), on the one hand, states that "[c]ompliance with a permit issued pursuant to this section . . . shall be deemed compliance . . . with [Sections 301, 307, and 403]." 33 U.S.C. § 1344(p). Section 402(k), on the other hand, provides that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance . . . with [Sections 301, 302, *306*, 307, and 403]." *Id.* § 1342(k) (emphasis added). Each of these provisions, in other words, confirms that the holder of a Clean Water Act permit, by complying with the permit, is complying both with the general command of Section 301(a) that "the discharge of any pollutant . . . shall be unlawful" without a permit, *id.* § 1311(a), and with the specific requirements applicable under the respective permit program. *Compare id.* § 1344(b), (f), & (h)(1)(A) (showing that the Section 404(b)(1) guidelines and Sections 307 and 403 apply under Section 404), *with id.* § 1342(a) (requiring that Section 402 permits comply, "notwithstanding [Section 301(a)]," with "all applicable requirements" of Sections 301, 306, 307, and 403). Notably, Section 404(p) does not address requirements inapplicable under Section 404 (such as Section 306), just as Section 402(k) does not address requirements inapplicable under Section 402 (such as the Section 404(b)(1) guidelines).

b. The legislative history confirms that Congress intended for fill material to fall within the Corps' domain. The Senate bill originally proposed in 1972

to amend the existing Federal Water Control Act did not include a Section 404 or any program addressing discharges of fill material. *See* S. 2770, 92d Cong. §§ 402–501 (1971). When an amendment containing an early version of Section 404 (which addressed only dredged material, not fill material) was proposed, the bill's sponsor, Senator Muskie, opposed it on the ground that "[s]poil disposal is a pollutant" and that anyone wishing to dispose of spoil in navigable waters should be required "to get a permit from EPA or the State, just as would be required for other discharges." Senate Debate on S. 2770 (Nov. 2, 1971), *reprinted in* 2 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1388 (1972). Senator Muskie also objected that the proposed Section 404 would "shift the environmental evaluation authority from EPA to the Corps of Engineers." *Id.*

While that amendment failed in the Senate, an amendment proposed by the House included a Section 404 that proposed "a separate permit program for the discharge of dredged or fill material" and provided that "[t]his program would be administered by the Secretary of the Army, acting through the Chief of Engineers." S. Rep. No. 92-1236, at 141 (Conf. Rep.). The House version of Section 404, contrary to Senator Muskie's desire to have any and all discharges regulated by EPA, in fact provided that the Secretary of the Army "need not follow the designation of the [EPA] Administrator where the Secretary certifies there is no economically feasible alternative reasonably available." *See* Hearings on H.R. 11896 Before the H. Comm. on Public Works, 92 Cong. 308 (1971). Because the then-acting EPA Administrator "strongly oppose[d]" this version where permit grants would not be "subject to EPA review and concurrence

with respect to environmental considerations," *id.*, Section 404 was revised to provide EPA with a veto over the grant of a Section 404 permit. Senate Consideration of the Report of the Conference Committee (1972), *reprinted in* 1 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1972) ("the Conferees agreed that the Administrator of the [EPA] should have the veto"); *see also* 33 U.S.C. § 1344(c). But even as Congress backed away from giving the Corps exclusive authority over such discharges, Congress retained the proposed Section 404 program administered by the Corps, under guidelines developed by EPA in consultation with the Corps. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816, 884.

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The Ninth Circuit's flawed construction of the Clean Water Act results directly from its cart-before-the-horse approach to statutory interpretation: The court started with the proposition that the two regulations potentially implicated by the discharge—that is, the froth-flotation effluent limitation and the regulation defining "fill material"—conflicted intractably and then interpreted the *Act* in light of those *regulations*. *See, e.g.*, J.A. 525a–26a ("Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern . . ., but they result in different interpretations of the Act."). If that were the law, then the promulgation of an EPA *regulation* setting out a new effluent restrictions on the discharge of rock, sand, and dirt (paradigmatic examples of fill material) could render meaningless a *statutory provision* (Section 404) and could negate Congress's clear intention to create a

Corps-administered permit program for discharges of fill material. Even without the EPA reaching that far, on the Ninth Circuit's view, the Section 404 permit program applies not to "fill material," but only to a residual subset of "fill material" not potentially implicated by any of the hundreds of effluent restrictions promulgated by EPA. *See* 40 C.F.R. subchapter N, pts. 400–71. But that is not the line EPA and the Corps drew in their notice-and-comment rulemaking defining the statutory term—in announcing its effects-based definition, EPA made clear that it "has *never* sought to regulate fill material under effluent guidelines," Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added)—and that line has not been challenged in this litigation.

II. The Ninth Circuit Erred By Rejecting The Corps' Construction Of Its Own Rule

It is well settled that a court must defer to an agency's construction of its own regulation—it has "controlling weight," *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)—unless that interpretation is "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The joint EPA-Corps Fill Rule defines "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States" and provides that a "discharge of fill material" "includes . . . placement of . . . slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)(1)(ii) & (f). Even while admitting that the proposed mine tailings discharge "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake," J.A.

526a, the Ninth Circuit held that the Corps' interpretation was unreasonable because it was inconsistent with the "regulatory history," which it found "dispositive." *Id.* 547a. Based on its reading of the regulatory history, the Ninth Circuit ascribed to the promulgating agencies an intent to apply their Fill Rule to "*only* . . . those tailings and other mining-related materials that are not subject to effluent limitations." *Id.* 546a (emphasis added). The Ninth Circuit erred both in its methodology and its conclusion. The Corps' interpretation of its Fill Rule (with which EPA concurred) was compelled by its text, amply supported by its history, and consistent with the Corps' historical treatment of mine tailings.

A. The Ninth Circuit Disregarded The Text Of The Fill Rule

The court of appeals began its regulatory analysis with the history of the Fill Rule. By relying on selected excerpts from the regulatory history, the Ninth Circuit appears to have adopted the position that an agency construction that is consistent with the *text* of the regulation may nonetheless be rejected as unreasonable if an examination of the regulatory *history* demonstrates that the text does not accurately reflect the agency's regulatory intent. *See* J.A. 535a ("Although the plain language of the Clean Water Act resolves the apparent regulatory conflict at the heart of this case, the regulatory history further demonstrates . . . .").

This is clearly wrong. The starting point for regulatory interpretation is the text itself—not the regulatory history—and "if the meaning of the words used is in doubt," "a court must necessarily look to the administrative construction of the regulation." *Seminole Rock*, 325 U.S. at 414. The "*only* tools,

therefore, are the plain words of the regulation and any relevant interpretations of the [relevant agency]." *Id.* (emphasis added).

In *United States v. Locke*, 471 U.S. 84 (1985), this Court explained that where statutory language "is plain and the agency's construction completely consistent with that language, the agency's construction simply cannot be found 'sufficiently unreasonable' as to be unacceptable." *Id.* at 96. The analysis of *Locke* applies with even greater force when, as here, an agency is construing not a statute but its own regulation; it is in that context that courts owe maximum deference to an agency's interpretation. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) (explaining that "this Court shows great deference to the interpretation given [a] statute by the . . . agency charged with its administration" and that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"); *see also Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to *further deference* when it adopts a reasonable interpretation of regulations it has put in force.") (citation omitted and emphasis added). Having conceded that the agencies' construction "facially meets" the joint Fill Rule, J.A. 526a, the court of appeals had no authority to set that interpretation aside. *See Locke*, 471 U.S. at 96.

Under *Seminole Rock* and *Auer*, the Ninth Circuit was required to interpret the Fill Rule by turning first to its text and then to the agencies' interpretation of their own regulation. The plain language of the Fill Rule defined "fill material" as any material

that "[c]hang[es] the bottom elevation of any portion of a water of the United States" and defined "discharge of fill material" to include "slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(e)(1)(ii) & (f). The Corps' issuance of a permit for the proposed discharge of a mine tailings slurry into Lower Slate Lake where it would have the effect of "rais[ing] the bottom elevation of the lake by 50 feet" is indisputably consistent with the Fill Rule's text. J.A. 519. The Ninth Circuit's acknowledgement that the proposed discharge "facially meets the Corps' current regulatory definition of 'fill material,'" J.A. 526a, therefore ought to have been both the beginning and the ending of the court's analysis.

B. The Regulatory History Confirms That Effluent Restrictions Do Not Apply To Discharges Of Fill Material, Including Mine Tailings

To determine whether the agencies reasonably could conclude that Coeur's proposed discharge of mine tailings was encompassed by the definition of "fill material" set out in the Fill Rule, the Ninth Circuit did not need to—and therefore lacked the authority to—look beyond the text of the Fill Rule itself. *See Seminole Rock*, 325 U.S. at 414. But even the "regulatory history" confirms that the agencies reasonably interpreted their regulation when they concluded that Coeur's proposed tailings slurry was "slurry, or tailings or similar mining-related materials" embraced within the definition of "discharge of fill material." 33 C.F.R. § 323.2(f).

The Ninth Circuit concluded that the Fill Rule applies to "*only* . . . tailings and other mining-related materials . . . not subject to effluent limitations," J.A. 546a (emphasis added), but the regulatory history

states that "[t]he language in today's final rule will clarify that *any mining-related material* that has the effect of fill when discharged will be regulated as 'fill material.'" Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added). The Ninth Circuit quoted statements in the regulatory history indicating that the agencies "did not intend to change their longstanding practice," J.A. 542a, but ignored the agencies' explanation of what that practice was: The agencies confirmed that the rule would "maintain [their] existing approach to regulating pollutants under *either* Section 402 *or* 404," that "[e]ffluent limitation guidelines and new source performance standards . . . are incorporated into permits issued under section 402 of the Act," that the Fill Rule would "not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs," and that "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphases added). The agencies even specifically addressed the type of discharge at issue here, noting that the words "slurry, or tailings or similar mining-related material" were added to the Fill Rule to "clarify that *any mining-related material* that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* (emphasis added).

Statements the agencies made in 2002 when responding to comments on a draft version of the Fill Rule further demonstrate the agencies' longstanding practice of applying effluent restrictions only under Section 402, not Section 404, and of regulating mining-related materials, such as tailings, under Section 404. The agencies noted that "mining by-products"—such as tailings—"resulting from mining beneficiation or the processing of mined materials" "may

have a slightly different physical form from the traditional rock and soil used as fill material, but [they] can have the same effect on the aquatic environment as those materials." J.A. 92a–93a. The agencies accordingly declared that where the discharge of mining by-products "will result . . . in . . . a change in the bottom elevation," it "clearly qualif[ies] as 'fill material' under this rule" and "will be regulated by the Corps under section 404 of the Act." *Id.* 93a. This statement echoes an earlier EPA statement, made in 1977 when EPA's Acting Administrator testified in a letter to Congress, that discharges of fill material *from mining operations* were regulated under Section 404: "Where mining requires . . . in-stream sediment control impoundments that involve discharges of material into water, individual and general [Section 404] permitting procedures are applicable." H. Rep. No. 95-139, at 62 (1977) (testimony about Section 404 during consideration of 1977 amendments to the Clean Water Act).

Indeed, when drafting the current Fill Rule, the agencies specifically considered and rejected a provision that would have had the same effect as the Ninth Circuit's ruling. The proposed version of the Fill Rule contained a provision that would have expressly excluded discharges governed by effluent restrictions from qualifying as fill material: "The term fill material does not include discharges covered by proposed or final effluent limitations guidelines and standards . . . ." Proposed Revisions, 65 Fed. Reg. at 21,299. The agencies, however, deleted this provision from the final Fill Rule. Final Revisions, 67 Fed. Reg. at 31,135 ("[T]oday's final rule also deletes the exclusion contained in the proposal for discharges covered by effluent limitation guidelines or standards or NPDES permits."). Rather than recog-

nizing this as evidence that the Fill Rule does not contain the exclusion, *see* J.A. 544a–45a, the Ninth Circuit reinserted that precise exclusion: "[T]he current fill rule only applies to those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance." *Id.* 546a; *compare id.*, *with* 33 C.F.R. § 323.2(e) & (f). But it is the version of the rule that was actually promulgated that controls, not the discarded draft. In fact, in 1985 this Court reversed a court of appeals that similarly rewrote a regulation defining a phrase ("waters of the United States") from the precise statute at issue here—Section 404 of the Clean Water Act. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court noted that the "history of the regulation underscore[d] the absence of [a particular requirement]" and concluded that the court of appeals, by "fashioning its own requirement," "improperly reintroduced into the regulation precisely what the Corps had excised." *Id.* at 130; *cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) ("when Congress deletes limiting language, 'it may be presumed that the limitation was not intended'" (quoting *Russello v. United States*, 464 U.S. 16, 23–24 (1983))).

Against all this, the Ninth Circuit latched onto selected snippets from the regulatory history in order to conclude that the "Corps' application of the fill rule in this case . . . contradicts its interpretation at the time the regulation was promulgated." J.A. 536a. But the statements that the Ninth Circuit relied on, *see id.* 542a–46a, support the court's analysis only if the agencies believed that mine tailings were not fill material—an assumption that is clearly false, *see* 33 C.F.R. § 323.2(f). Indeed, the statement that the Ninth Circuit found particularly compelling—

that "'if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] *under specific circumstances*, then that determination remains valid,'" J.A. 545–46a (quoting J.A. 48a) (some emphasis removed)—does not state a general rule, as the court would have it, that all mining-related materials are subject to effluent restrictions even if they have the effect of fill. Quite the contrary, it suggests only a limited exception to the rule the agencies stated in the preceding sentence of the regulatory history—that "the placement of 'overburden, slurry, or tailings or similar mining-related materials' is considered a discharge of fill material" and "is regulated under Section 404," *id.* 48a. That limited exception applies, as the agencies expressly noted, only in "specific circumstances" (for example, to effluent discharges *from* tailings impoundments or other settling ponds, or when EPA vetoes a Section 404 permit), not across the board.

C. The Corps Has Long Regulated Discharges Of Mine Tailings As Fill Material

SEACC, seeking to portray this case as "a one-time departure from long established practice," has contended that from 1982 "until 2005, the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill—or from any other source subject to EPA effluent limitations—into navigable waters." SEACC Opp. to Cert. Pet. 1–2. To the contrary, the Corps (in conjunction with EPA) has repeatedly, as the following examples from the 1980s, 1990s, and 2000s show, authorized Section 404 permits for mine tailings even when an EPA effluent limitation existed that could have applied—had the discharge not qualified as fill material—because of the processes used at the mines.

The Corps' interpretation of the Fill Rule is consistent with longstanding practices concerning the disposal of mine tailings, practices that have created settled expectations in the regulated community. As early as 1886, Congress directed that "the Secretary of the Army" may authorize "deposits of debris of mines" in navigable waters "where harbor-lines have not been established." 33 U.S.C. § 407a. And in 1977, as noted earlier, EPA's Acting Administrator testified to Congress that discharges of fill material from mining operations were regulated under Section 404: "Where mining requires . . . in-stream sediment control impoundments that involve discharges of material into water, individual and general [Section 404] permitting procedures are applicable." H. Rep. No. 95-139, at 62.

The Red Dog Mine in northwest Alaska—the largest zinc mine in the world—is an open-pit mine that uses a froth-flotation process to produce lead and zinc. C.A. J.S.E.R. 836. Since 1982, two effluent restrictions—one of which is the froth-flotation standard of performance at issue here—have been in place and could have been applied to the mine. *See* 40 C.F.R. § 440.102(a) (promulgated at Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598, 54617–18 (Dec. 3, 1982)) (effluent limitation for "mine drainage" for mines using "open-pit . . . operations"); *id.* § 440.104(b)(1) (promulgated at 47 Fed. Reg. at 54,619) (performance standard for "mills that use the froth-flotation process"). In its Final Environmental Impact Statement for the Red Dog Mine, EPA explained that a "[t]hickened tailings slurry from the mill concentrating process" would be fed "into the tailings pond." C.A. J.S.E.R. 1097. Despite the presence of effluent

restrictions relating to the mill source and despite observing that "the liquid portion" of the slurry "from the mill concentrating process" would "consist[] of excess *process water*," *id.* (emphasis added), the Corps granted a Section 404 permit in 1985 that authorized, to quote the permit itself, the discharge of "*mine tailings* in the south fork of Red Dog Creek," *id.* 979 (emphasis added).

The Fort Knox Mine is "an open pit gold mine near Fairbanks, Alaska." C.A. J.S.E.R. 983. The effluent limitation for open-pit mining mentioned above also applied to "mine drainage from mines," such as the Fort Knox Mine, "operated to obtain . . . gold bearing ores." 40 C.F.R. § 440.102(a). Despite the potentially applicable effluent limitation, the Corps in 1994 granted a Section 404 permit to the mine for the discharge of approximately 4.5 million cubic yards of "fill material into approximately 103 acres of waters of the United States" for a tailings impoundment. C.A. J.S.E.R. 983–86, 989; *see also id.* 985 (referring, in the conditions section of the permit, to the discharge of "tailings into the tailings impoundment").

Over the last twenty years, the Corps has also repeatedly reauthorized a nationwide permit for coal mining notwithstanding the existence of a related effluent restriction. In 1982, the Corps issued Nationwide Permit No. 21, which authorizes "discharges associated with surface coal mining activities." Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,833 (July 22, 1982). The Corps has continued reauthorizing this national Section 404 permit since 1982, *see, e.g.*, Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,184 (Mar. 12, 2007), despite the fact that

effluent restrictions have existed since 1985 for "discharges from any coal mine at which the extraction of coal is taking place or is planned to be undertaken and to coal preparation plants and associated area," 40 C.F.R. § 434.10 (promulgated at Coal Mining Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 50 Fed. Reg. 41,296, 41,305 (Oct. 9, 1985)). This nationwide permit authorizes discharges when "the district engineer makes a determination that the individual and cumulative adverse effects on the environment from such . . . discharges are minimal." Interim Final Rule, 47 Fed. Reg. at 31,833.

These examples demonstrate that for the past 23 years, the Corps has repeatedly authorized (and EPA has not vetoed) Section 404 permits for mining-related discharges when effluent restrictions existed—including the very performance standard at issue here—that could have been applied to the discharges. The agencies granted these Section 404 permits even in instances when "process water" was mixed in with the tailings. C.A. J.S.E.R. 1097. Indeed, an EPA memorandum written in 2004 to explain its regulatory approach to discharges of mine tailings used the Kensington mine as an example of how to apply the Fill Rule "to other comparable mining proposals." J.A. 142a n.1 (entitled "Clean Water Act Regulation of Mine Tailings"). The "Mine Tailings" memorandum states that EPA "believe[s] that the text of the rule makes clear that mine tailings placed into impounded waters of the U.S., as proposed by the Kensington mine project, are regulated under section 404 of the CWA as a discharge of fill material." *Id.* 144a. In fact, the "Mine Tailings" memorandum expressly recognized that "the regulatory regime applicable to discharges under section

402, including effluent limitation guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. pt. 440, subpt. J), do[es] not apply to the placement of tailings into the proposed impoundment." *Id.* 144a–45a (citing 40 C.F.R. § 122.3(b) ("Discharges of . . . fill material . . . which are regulated under section 404" "do not require [EPA] NPDES permits."). As EPA wrote in promulgating the Fill Rule, "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

* * *

The court of appeals' refusal to defer to the agencies' interpretation of their own joint regulation wrested from the Corps and EPA the authority Congress delegated them to draw the line separating discharges of fill material from discharges of all other pollutants. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("[T]the power authoritatively to interpret its own regulations is a component of [an] agency's delegated lawmaking powers."). By substituting its policy preferences for those of the agencies charged with administering the Clean Water Act, the Ninth Circuit contravened this Court's guidance that Congress expects agencies' to make "substantive choices" when it "leaves the intersection of competing objectives . . . imprecisely marked." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002); *see also Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (agency interpretations that resolve "fundamental ambiguit[ies]" resulting from "differing mandates" in statutory texts by developing a "'reasonable interpretation' of the statutory scheme" are "entitled to deference"). And even aside

from the Ninth Circuit's lack of authority to make such policy judgments, there is no reason to think that the Ninth Circuit is better equipped than Congress, EPA, or the Corps—let alone all three—to decide how to balance interests in protecting the environment against interests in using natural resources, including "economic values" and "mineral exploitation." 33 U.S.C. § 1343(c) (setting out guidelines cross-referenced in Section 404(b)(1)).

CONCLUSION

The Ninth Circuit erred at each step of the way. Ignoring the structure and history of the statute, the court read the word "and" to require compliance with mutually exclusive provisions. It discounted the fact that Congress specifically enumerated different requirements and permitted general statutory provisions to trump specific ones. Refusing to defer to the agencies' construction of a regulation they drafted jointly, the court of appeals also made no attempt to reconcile its interpretation with the plain text of the Fill Rule. Instead, it searched the regulatory history for scattered phrases that could be construed to support SEACC's position, mischaracterized the approach consistently taken by the agencies for decades, and then wrote into the Fill Rule an exception the agencies specifically rejected.

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to vacate immediately the injunction pending appeal and to affirm the judgment of the district court.

Respectfully submitted.

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APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 301 of the Clean Water Act (Title 33 U.S.C. § 1311) provides, in relevant part:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

* * * * *

Section 306(e) of the Clean Water Act (33 U.S.C. § 1316(e)), provides:

§ 1316. National standards of performance

* * * * *

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 402 of the Clean Water Act (33 U.S.C. § 1342) provides, in relevant part:

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator

determines are necessary to carry out the provisions of this chapter.

* * * * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * * * *

Section 404 of the Clean Water Act (33 U.S.C. § 1344) provides:

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only

minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the

requirements of subparagraphs (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under

State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and

statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimi-

nation of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secre-

tary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also de-

scribe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of

a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such

State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is author-

ized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(l) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application

or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum

extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United

States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such

---

1 So in original. Probably should be "action."

State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

REGULATIONS INVOLVED

33 C.F.R. § 323.2 provides, in relevant part:

§ 323.2 Definitions.

For the purpose of this part, the following terms are defined:

* * * * *

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

* * * * *

40 C.F.R. § 122.3 provides, in relevant part:

§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

* * * * *

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

* * * * *

40 C.F.R. § 232.2 provides, in relevant part:

§ 232.2 Definitions.

* * * * *

Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement

of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; . . . and artificial reefs.

* * * * *

Fill material. (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

* * * * *

40 C.F.R. § 401.11 provides, in relevant part:

§ 401.11 General definitions.

* * * * *

For the purposes of Parts 402 through 699 of this subchapter:

* * * * *

(i) The term *effluent limitation* means any restriction established by the Administrator on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources, other than new sources, into navigable waters, the waters of the contiguous zone or the ocean.

* * * * *

40 C.F.R. § 434.10 provides, in relevant part:

§ 434.10 Applicability.

This part applies to discharges from any coal mine at which the extraction of coal is taking place or is planned to be undertaken and to coal preparation plants and associated areas.

40 C.F.R. § 440.102 provides, in relevant part:

§ 440.102 Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology (BPT).

* * * * *

Except as provided in subpart L of this part and 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT):

(a) The concentration of pollutants discharged in mine drainage from mines operated to obtain copper bearing ores, lead bearing ores, zinc bearing ores, gold bearing ores, or silver bearing ores, or any combination of these ores open-pit or underground operations other than placer deposits shall not exceed:

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter	
TSS	30	20
Cu	.30	.15
Zn	1.5	.75
Pb	.6	.3
Hg	.002	.001
pH	(1)	(1)

[1] Within the range 6.0 to 9.0.

* * * * *

40 C.F.R. § 440.104 provides, in relevant part:

§ 440.104 New source performance standards (NSPS).

Except as provided in Subpart L of this part any new source subject to this subsection must achieve the following NSPS representing the degree of effluent reduction attainable by

the application of the best available demonstrated technology (BADT):

* * * * *

(b)(1) Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores. The Agency recognizes that the elimination of the discharge of pollutants to navigable waters may result in an increase in discharges of some pollutants to other media. The Agency has considered these impacts and has addressed them in the preamble published on December 3, 1982.

(2)(i) In the event that the annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility exceeds the annual evaporation, a volume of water equal to the difference between annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility and annual evaporation may be discharged subject to the limitations set forth in paragraph (a) of this section.

(ii) In the event there is a build up of contaminants in the recycle water which significantly interferes with the ore recovery process and this interference can not be eliminated through appropriate treatment of the recycle water, the permitting author-

ity may allow a discharge of process wastewater in an amount necessary to correct the interference problem after installation of appropriate treatment. This discharge shall be subject to the limitations of paragraph (a) of this section. The facility shall have the burden of demonstrating to the permitting authority that the discharge is necessary to eliminate interference in the ore recovery process and that the interference could not be eliminated through appropriate treatment of the recycle water.

* * * * *

PETITIONER'S BRIEF

Nos. 07-984 & 07-990

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

STATE OF ALASKA,

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v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Ninth Circuit erred in invalidating the longstanding regulatory interpretation of the U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA") that discharges of dredged or fill material are subject to the exclusive permitting authority of the Corps under Section 404 of the Clean Water Act, rather than effluent limitations and standards of performance promulgated under Sections 301 and 306 and applied by EPA pursuant to its separate permitting authority under Section 402.

PARTIES TO THE PROCEEDINGS

Petitioner in No. 07-990 is the State of Alaska. The State was a defendant-intervenor and appellee below.

Petitioner in No. 07-984 is Coeur Alaska, Inc. Coeur Alaska, Inc. was a defendant-intervenor and appellee below.

The Federal government respondents in this Court are the United States Army Corps of Engineers; Kevin J. Wilson, in his official capacity as District Engineer; Michael Rabbe, in his official capacity as Chief of the Regulatory Branch; George S. Dunlop, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); and the United States Forest Service. These respondents, or their predecessors in their official capacities, were defendant-appellees below. Mr. Wilson succeeded Colonel Timothy J. Gallagher as District Engineer. Mr. Rabbe succeeded Larry L. Reeder as Chief of the Regulatory Branch. Mr. Dunlop succeeded Dominic Izzo as Principal Deputy Assistant Secretary.

Goldbelt, Inc. is also a respondent in this Court. Goldbelt, Inc. was a defendant-intervenor and appellee below.

Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation are also respondents in this Court. These respondents were plaintiff-appellants below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. The Statutory Scheme	4
B. The Agencies' Interpretation	8
1. The Agencies Have Always Agreed That The Corps Has Exclusive Authority Over Fill Material	8
2. The 2002 Fill Rule	9
C. The Kensington Project	12
1. Tailings Disposal Options	12
2. The Permits	16
D. The Decisions Below	18
SUMMARY OF THE ARGUMENT	20
ARGUMENT	23

TABLE OF CONTENTS—Continued

I. THE CWA IS UNAMBIGUOUS THAT THE CORPS HAS EXCLUSIVE AUTHORITY UNDER SECTION 404 TO PERMIT DISCHARGES OF FILL MATERIAL, SUBJECT TO EPA'S VETO RIGHT 24

A. Sections 402 And 404 Are Separate Permitting Programs Governed By Different Regulations 24

B. The Provisions Relied On By The Ninth Circuit Do Not Provide Otherwise 30

C. The History Of The CWA Confirms The Corps' Exclusive Permitting Role. 35

1. The Corps' Pre-Existing Authority To Permit Discharges Of Mine Tailings 36

2. The CWA Compromise 38

II. THE AGENCIES REASONABLY RESOLVED ANY AMBIGUITY. 41

III. THE AGENCIES' INTERPRETATION OF THEIR OWN REGULATIONS IS NOT PLAINLY ERRONEOUS. 49

CONCLUSION 55

TABLE OF AUTHORITIES

Page

CASES:

Auer v. *Robbins*, 519 U.S. 452 (1997) 50

Barnhart v. *Walton*, 535 U.S. 212 (2002) 42

Bates v. *United States*, 522 U.S. 23 (1997)..... 27

Chemical Mfrs. Ass'n v. *NRDC*, 470 U.S. 116 (1985)..... 42

Chevron U.S.A. Inc. v. *Echazabal*, 536 U.S. 73 (2002)..... 44

Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)..... 23, 24, 35

E. I. Du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977)..... 35

Federal Express Corp. v. *Holowecki*, 128 S. Ct. 1147 (2008)..... 50

Kentuckians for the Commonwealth, Inc. v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003)..... 42

National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007).....43, 44, 50, 54

Rapanos v. *United States*, 547 U.S. 715 (2006) 22, 25, 46, 48

Reserve Mining Co. v. *EPA*, 514 F.2d 492 (8th Cir. 1975).....37, 38

Russello v. *United States*, 464 U.S. 16 (1983)..... 27

TABLE OF AUTHORITIES—Continued

	Page
S.D. Warren Co. v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006)	27
Solid Waste Agency of N. Cook County v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)	49
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994)	50
United States v. *Fisk*, 70 U.S. 445 (1866)	30
United States v. *Granderson*, 511 U.S. 39 (1994)	27
United States v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973)	37
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)	49
United States v. *Standard Oil Co.*, 384 U.S. 224 (1966)	37, 47
Willamette Iron Bridge Co. v. *Hatch*, 125 U.S. 1 (1888)	37
STATUTES:	
18 U.S.C. § 1963(a)(1)	28
28 U.S.C. § 1254(1)	2
33 U.S.C. § 401 *et seq*	37
33 U.S.C. § 407a	36
Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816, as amended:	
§ 101(a), 33 U. S. C. § 1251(a)	4, 5

TABLE OF AUTHORITIES—Continued

	Page
§ 301, 33 U.S.C. § 1311	1, 6
§ 301(a), 33 U.S.C. § 1311(a)	*passim*
§ 301(e), 33 U.S.C. § 1311(e)	32
§ 301(g)(4), 33 U.S.C. § 1311(g)(4)	33
§ 301(j)(1), 33 U.S.C. § 1311(j)(1)	26
§ 306, 33 U.S.C. § 1316	2, 6
§ 306(e), 33 U.S.C. § 1316(e)	33
§ 307, 33 U.S.C. § 1317	5
§ 307(a)(5), 33 U.S.C. § 1317(a)(5)	21, 29
§ 309, 33 U.S.C. §§ 1319	32
§ 310(c), 33 U.S.C. § 1320(c)	33
§ 312(f)(1), 33 U.S.C. § 1322(f)(1)	26
§ 312(g)(2), 33 U.S.C. § 1322(g)(2)	33
§ 315, 33 U.S.C. § 1325	33
§ 318, 33 U.S.C. § 1328	*passim*
§ 318(b), 33 U.S.C. § 1328(b)	28
§ 401, 33 U.S.C. § 1341	7
§ 401(a), 33 U.S.C. § 1341(a)	3
§ 402, 33 U.S.C. § 1342	*passim*
§ 402(a), 33 U.S.C. § 1342(a)	*passim*
§ 402(a)(1), 33 U.S.C. § 1342(a)(1)	27
§ 403(c), 33 U.S.C. § 1343(c)	48
§ 403(c)(1), 33 U.S.C. § 1343(c)(1)	45
§ 404, 33 U.S.C. § 1344	*passim*
§ 404(a), 33 U.S.C. § 1344(a)	4
§ 404(b)(1), 33 U.S.C. § 1344(b)(1)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
§ 404(c), 33 U.S.C. § 1344(c)	6
§ 404(f), 33 U.S.C. § 1344(f)	4, 26
§ 404(g)-(k), 33 U.S.C. § 1344(g)-(k)	7
§ 404(p), 33 U.S.C. § 1344(p)	*passim*
§ 502(11), 33 U.S.C. § 1362(11)	6
§ 505, 33 U.S.C. § 1365	26
Clean Water Act Amendments of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599 (1977)	28
Rivers and Harbors Appropriations Act of 1886, 24 Stat. 329 (1886)	36
Water Quality Act of 1987, Pub. L. No. 100-4, § 313(d) (1987)	28
Water Resources Development Act of 1986, Pub. L. 99-662, tit. XI, § 1106 (1986)	37
CONGRESSIONAL MATERIALS:	
17 Cong. Rec. 6827-29 (1886)	36
117 Cong. Rec. 38854 (1971)	38
117 Cong. Rec. 38883 (1971)	38
118 Cong. Rec. 10632 (1972)	39
118 Cong. Rec. 33699 (1972)	40
H.R. Rep. No. 92-911 (1972)	39
S. Rep. No. 92-414 (1971)	38

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS:

33 C.F.R. § 323.2(e) ..... *passim*
33 C.F.R. § 323.2(e) (2002) 9
40 C.F.R. § 122.3(b) ..... *passim*
40 C.F.R. § 230.1(a) 5
40 C.F.R. § 230.5(c) ..... *passim*
40 C.F.R. § 230.10(c)(2), (3) ..... *passim*
40 C.F.R. § 232.2 11
40 C.F.R. §§ 233.270-233.271 7
40 C.F.R. Part 440 ..... *passim*
40 C.F.R. § 440.104(b)(1) ..... *passim*

ADMINISTRATIVE MATERIALS:

38 Fed. Reg. 13,528 (1973) 8, 41
40 Fed. Reg. 19,766 (1975) 10
40 Fed. Reg. 31,320 (1975) 10
40 Fed. Reg. 41,292 (1975) 10
42 Fed. Reg. 37,122 (1977) 10
44 Fed. Reg. 54,222 (1979) 29
51 Fed. Reg. 8,871 (1986) 9
53 Fed. Reg. 20,764 (1988) 10
65 Fed. Reg. 21,292 (2000) ..... *passim*
67 Fed. Reg. 31,129 (2002) ..... *passim*

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER STATE OF ALASKA

OPINIONS BELOW

The opinion of the Ninth Circuit is available at 486 F.3d 638 and is reproduced at JA517a. The unpublished order of the District Court is reproduced at JA478a.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 22, 2007. JA517a. That court denied timely

filed petitions for rehearing and rehearing en banc on October 29, 2007. JA553a. This Court granted timely petitions for a writ of certiorari on June 27, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of relevant statutes and regulations is set forth in the appendix to this brief.

INTRODUCTION

This case involves a fundamental aspect of the Clean Water Act ("CWA"): its division of permitting responsibilities between the U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA"). Under Section 404 of the CWA, 33 U.S.C. § 1344, the Corps has the exclusive responsibility for permitting all discharges of "dredged or fill material" into the waters of the United States, pursuant to regulations developed specifically for the Section 404 program and subject to an EPA veto right if the discharge would have an unacceptable adverse effect on the environment. Under Section 402, 33 U.S.C. § 1342, EPA has the responsibility for permitting discharges of other pollutants pursuant to different regulations. Congress expressly provided that EPA's authority under Section 402 applies only "[e]xcept as provided in * * * [Section 404]," *id.*, thereby confirming the Corps' exclusive role to permit all discharges of dredged or fill material, even where that material might otherwise be subject to EPA's Section 402 authority.

In this case, the Ninth Circuit disregarded this careful statutory delineation of responsibilities, holding that the Corps may not issue—on any terms—a permit for the discharge of what is indisputably "fill material" within the meaning of

Section 404. It therefore invalidated a Corps permit for the discharge as fill material of mine "tailings"—ground up rock and earth that is left over after ore is extracted—even though the Corps had concluded after lengthy and exhaustive review that this was the most environmentally advantageous method of disposing of the tailings.

The Ninth Circuit's decision was wrong. It held that the fill material at issue is subject to the exclusive permitting jurisdiction of EPA, but the CWA confirms the opposite: that this authority is the exclusive responsibility of the Corps, subject to a potential EPA veto that was not exercised here. Indeed, the history of the CWA confirms that Congress intended to continue the Corps' longstanding authority to regulate all fill material, which for more than 120 years has been exercised to regulate discharges of mine tailings. And even if the statute were ambiguous, the agencies' consistent and longstanding division of regulatory responsibilities is reasonable, and therefore entitled to dispositive deference, given the language of the statute and the recognized differences between fill material and other, more mobile, discharges. Finally, there is no credence to the Ninth Circuit's determination that the agencies plainly erred in interpreting their own regulations as vesting the Corps with exclusive permitting authority over fill material. In fact, the regulations expressly recognize that EPA has never subjected fill material to its own separate regulations.

The State of Alaska, which has an independent duty to ensure that permits comply with the CWA, *see* 33 U.S.C. § 1341(a), has determined that the permit at issue is both valid and the most environ-

mentally protective option. The Court should uphold that permit and reverse the decision below.

STATEMENT OF THE CASE

A. The Statutory Scheme.

The purpose of the Federal Water Pollution Control Act Amendments of 1972, popularly known as the Clean Water Act, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a). The CWA allows the discharge of material into waters of the United States pursuant to a permit issued either by the Corps under Section 404, 33 U.S.C. § 1344, or by EPA under Section 402, 33 U.S.C. § 1342.[1]

Section 404 provides, in pertinent part, that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters" under guidelines (known as the "Section 404(b)(1) Guidelines") developed jointly by EPA and the Corps. 33 U.S.C. § 1344(a), (b)(1). By contrast, Section 402 provides, in pertinent part, that

> *[e]xcept as provided in section[] * * * 1344 of this title* [Section 404 of the CWA], the Administrator [of EPA] may * * * issue a permit for the discharge of any pollutant, or combination of pollutants * * * upon condition that such discharge will meet * * * all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title.

---

[1] The only exceptions to the permit requirement are for certain farming practices, not at issue here, which require no permits under either Section 404 or Section 402. *See* 33 U.S.C. § 1344(f). EPA also may issue permits for aquaculture projects under Section 318, but that section, as amended, now incorporates all the requirements of Section 402. *See* 33 U.S.C. § 1328.

33 U.S.C. § 1342(a) (emphasis added). The Section 402 program is also known as the National Pollutant Discharge Elimination System ("NPDES").

The two programs are thus mutually exclusive. Under Section 404, the Corps may issue permits for the discharge of "dredged or fill material," whereas under Section 402 EPA may issue permits for the discharge of other pollutants "[e]xcept as provided in [Section 404]." As the agencies have explained, these "two regulatory programs were established by the CWA serving distinct objectives and goals." JA47a. The Section 402 program "limits discharges of pollutants in order to protect water quality of the receiving water." *Id.* By contrast, the Section 404 program "regulates dredged and fill activities that, among other things, may displace or change the elevation of receiving water." *Id.*

Section 404 permitting is a rigorous process. The Section 404(b)(1) Guidelines are developed by EPA in conjunction with the Corps specifically for the Section 404 program. 33 U.S.C. § 1344(b)(1). The goal of the Guidelines is exactly the same as that of the CWA itself: "to restore and maintain the chemical, physical, and biological integrity of waters of the United States." 40 C.F.R. § 230.1(a). *Accord* 33 U.S.C. § 1251(a). Under the Guidelines, "discharges having significant adverse effects on aquatic ecosystems are not allowable." 65 Fed. Reg. 21,293 (2000) (citing 40 C.F.R. § 230.10(c)(2), (3)). The Guidelines require "careful consideration of the effects of the discharge on the aquatic ecosystem as a whole, as well as evaluation of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects." 65 Fed. Reg. 21,293 (2000). The Guidelines require use of the least

environmentally damaging practicable alternative. 40 C.F.R. § 230.5(c).

While the ultimate authority to issue dredge or fill permits lies with the Corps, Congress was careful to mandate EPA oversight as well. Under Section 404(c), EPA may veto any Section 404 permit if it determines that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas * * *, wildlife, or recreational areas." 33 U.S.C. § 1344(c).

EPA's separate Section 402 permitting authority is subject to different requirements. Unlike Section 404, which contains no such restrictions, Section 402 provides that an EPA permit must "meet * * * all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title." 33 U.S.C. § 1342(a). Most notably among that list, EPA permits must comply with applicable EPA-established "effluent limitations" under Section 301 of the CWA for existing sources, 33 U.S.C. § 1311, and "performance standards" under Section 306 for new sources, 33 U.S.C. § 1316. The substance of these two categories of standards is generally congruent, and this brief will refer to them collectively as "effluent limitations." *See* JA529a n.8 ("A standard of performance is one type of effluent limitation.") (citing 33 U.S.C. § 1362(11)). Unlike EPA's regulations for Section 402 permits, the Section 404(b)(1) Guidelines do not mandate compliance with effluent limitations promulgated under Sections 301(e) or 306(e).[2]

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[2] The Guidelines do, however, require compliance with toxic effluent limitations, which are promulgated by EPA under Section 307 of the CWA, and which Congress expressly

Under Section 401 of the CWA, both EPA and the Corps are further restricted by the States' authority. 33 U.S.C. § 1341. To receive a permit under either Sections 402 or 404, an applicant must obtain a "certification from the State in which the discharge originates * * * that any such discharge will comply with" applicable federal and state water quality laws. 33 U.S.C. § 1341. Under Section 401, states such as Alaska therefore have an independent interest in ensuring the proper application of the CWA, since they must independently certify, *inter alia*, that any applicable provisions of Sections 301 and 306 have been complied with. *See id.* In addition, certain states have received approval to administer their own Section 404 programs. *See* 33 U.S.C. § 1344(g)-(k); 40 C.F.R. §§ 233.270-233.271.

Tying the scheme together, Section 301(a) contains a general compliance requirement stating that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). And reinforcing the conclusive nature of a Section 404 permit, Section 404(p) provides that "compliance with a permit issued under [Section 404] constitutes compliance with * * * [Section 301]" for enforcement purposes. 33 U.S.C. § 1344(p).

These provisions create a consistent, comprehensive set of requirements for dredged or fill material: (1) the Corps may permit a discharge of such material provided the discharge complies with the Section 404(b)(1) Guidelines and is not vetoed by

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authorized EPA to apply to some Section 404 discharges. *See infra* at 29.

EPA; (2) such discharges are not subject to EPA's Section 402 authority, which applies only "[e]xcept as provided in * * * [Section 404]"; and (3) compliance with a Section 404 permit constitutes compliance with the overarching requirement of Section 301(a).

B. The Agencies' Interpretation.

1. The Agencies Have Always Agreed That The Corps Has Exclusive Authority Over Fill Material.

Over the years, the agencies have been consistent on the central point at issue in this case: that the Corps has exclusive jurisdiction, under Section 404, to issue permits for the discharge of dredged or fill material and that discharges of such material are not subject to permitting by EPA under Section 402 or to EPA's effluent limitations applied thereunder.

In 1973, in one of its first CWA rulemakings, EPA promulgated a regulation providing that "[d]redged or fill material discharged into navigable waters" does "*not require an NPDES [i.e., Section 402] permit.*" 38 Fed. Reg. 13,530 (1973) (codified at 40 C.F.R. § 125.4(d) (1973)) (emphasis added). That regulation is still in place today, in virtually identical form:

> The following discharges *do not require NPDES permits*:
>
> * * *
>
> (b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

40 C.F.R. § 122.3(b) (emphasis added). Thus, if a discharge meets the regulatory definition of "dredged or fill material," it has *never* required a Section 402 permit from EPA.

In 1986, the Corps and EPA adopted a Memorandum of Agreement ("MOA") between them. The MOA governed the process by which the agencies would determine whether a discharge was "fill material" regulated by the Corps under Section 404, or other material regulated by EPA under Section 402. 51 Fed. Reg. 8,871 (1986).[3] The agencies reconfirmed that the Corps had exclusive jurisdiction to permit discharges meeting the definition of fill material: "[d]ischarges listed in the Corps definition of 'discharge of fill material,' remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8,871.

Thus, the agencies have been consistent that discharges of fill material are regulated by the Corps under Section 404 and are not subject to the EPA effluent limitations that are applied under Section 402. Indeed, both agencies stated unequivocally in 2002 that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (2002) (emphasis supplied).

2. The 2002 Fill Rule.

Although they have been consistent on this basic division of authority, the federal agencies have not always had a uniform definition of what constitutes "fill material." But since 2002, the agencies have had a uniform definition, which has not been challenged in this case. And under that definition,

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[3] This determination was made in light of the Corps' then-applicable definition of fill material, which excepted discharges with the purpose of waste disposal. *See* 67 Fed. Reg. 31,129, 31,138 (2002); 33 C.F.R. § 323.2(e) (2002).

the tailings discharges at issue unquestionably constitute fill material.

By way of background, both the Corps and EPA adopted interim final rules in 1975 defining fill material as pollutants that "replac[e] an aquatic area with dry land or * * * chang[e] the bottom elevation of a water body for any purpose." 40 Fed. Reg. 31,325 (1975); 40 Fed. Reg. 41,298 (1975). As originally proposed, the definition would have "exclud[ed] material * * * subject to Section 402 of the [CWA]," 40 Fed. Reg. 19,770, 19,772, 19,774, 19,776, 19,795 (1975), but that exclusion was *not* adopted in the interim final rules.

Then, in 1977, the Corps adopted a purpose-based test for determining which discharges fell under its Section 404 authority. It defined "fill material" as any discharge that had the primary *purpose* of replacing an aquatic body or raising its bottom elevation. 42 Fed. Reg. 37,145 (1977). Meanwhile, EPA continued its *effects*-based test, which placed under the Corps' Section 404 authority "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body *for any purpose*." 53 Fed. Reg. 20,774 (1988) (emphasis added). "The difference complicated the regulatory program for some solid wastes discharged into waters of the U.S." because parties were unsure under which permit program their discharges fell. 53 Fed. Reg. 20,764 (1988).

That confusion led the Corps and EPA to promulgate a joint definition of "fill material" in 2002, known as the "Fill Rule". 67 Fed. Reg. 31,129 (2002). The rule adopted EPA's "effects-based" test, defining fill material as "material placed in the

waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2; 40 C.F.R. § 232.2. The agencies declared that the joint definition was advantageous over the purpose-based definition because its objectivity would yield more consistent results and because "discharges with similar environmental effects will be treated in a similar manner under the regulatory program." 67 Fed. Reg. 31,132-33. Although the definition, as originally proposed, would have excluded "discharges covered by proposed or final effluent limitations guidelines and standards under sections 301, 304 or 306 of the Clean Water Act," 65 Fed. Reg. 21,299 (2000), the final definition removed that exclusion.

The regulations also addressed the precise kind of discharge at issue in this case. The Fill Rule expressly provides that the discharge of "fill material" includes the "placement of overburden, slurry, or tailings, or similar mining-related materials." 33 C.F.R. § 323.2(f). As if this were not clear enough, the agencies further stated that "*any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material,'" and that "the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials." 67 Fed. Reg. 31,135 (emphasis added). The agencies also clarified that they would "maintain [their] existing approach to regulating pollutants under either section 402 or 404 of the CWA." *Id.* Thus, as noted above, fill material would not require a Section 402 permit and thus would not be subject to EPA effluent limitations applied thereunder. Instead, such material would be subject to the Corps'

jurisdiction under Section 404, and the separate regulations governing that program.

C. The Kensington Project.

Since 1990, Coeur Alaska, Inc. ("Coeur") and its predecessor have worked with federal and state agencies to develop the historic Kensington Mine, a gold mine located in Southeast Alaska. The Corps, EPA, the U.S. Forest Service, and the State have studied the Kensington Mine Project thoroughly, resulting in three environmental impact statements, several records of decision in 1992, 1997, 2004, and 2006, and numerous other studies, plans, and memoranda. *See* JA209a-11a, 340a-42a. All told, more than 900 studies have been completed, at a cost of over $26 million, that demonstrate the project's environmental soundness. Ninth Circuit Supplemental Excerpts of Record ("SER") 800.

1. Tailings Disposal Options.

"When a mine is developed, one of the key considerations for state and federal regulators is a determination of where the resulting mine tailings will be disposed." SER835. Tailings are ground up rock and earth left over after minerals are extracted; for the Kensington Project, they will be physically similar to wet sand. Ninth Circuit Excerpts of Record ("ER") 77. Over the more than 15 years that the Project was in the permitting process, Coeur, in conjunction with state and federal agencies, evaluated multiple alternatives for storing the discarded tailings from which the gold will have been extracted. JA221a-24a.

The agencies were presented with several variations on two basic options for disposing of the tailings after they leave the mine: (1) a dry tailings facility and (2) wet tailings storage. The proposals for a dry

tailings facility involved filling in wetlands and then placing the tailings on top of the filled area. JA221a; SER860-61. Wet tailings storage, by contrast, involves treating the tailings and placing them in a nearby waterbody. JA222a-24a; SER861-63. Given the prevalence of regulated waters and wetlands near the mine—a common occurrence in Alaska, where the Corps has asserted CWA jurisdiction over more than 50% of the state *see* Alaska Pet. 31—there were no practicable alternatives that did not involve filling wetlands or waterbodies.

In November 2001, Coeur submitted the wet tailings storage proposal at issue in this case. The proposal involves backfilling 40% of tailings into the mine and placing the remainder as "fill material" in a secure impoundment created in Lower Slate Lake, a nearby 23-acre lake. The tailings were to be transported to the lake from the mine's mill in slurry form. JA482a. The tailings slurry is 55% solid by weight. JA482a; ER290, 302.

The State expended significant resources in conducting numerous tests of its own, and in contracting to have independent studies performed. JA156a-57a, 256a-65a; SER801. As a result of those tests and other data, the State determined that placing the mine tailings in Lower Slate Lake is the environmentally preferable alternative. JA225a. After several tests showed "no toxic effects associated with the tailings," the State found that "the toxicity risks associated with the tailings will be low both during and after mining operations." JA156a. Metals concentrations in the Kensington tailings are comparable to those in nearby lake sediments, SER746, and most of the non-toxic chemicals added in the mill do not remain in the tailings, JA191a,

343a-44a, 481a. No cyanide or arsenic will be added in the mill to recover the gold, and final processing of the ore will be offsite. SER853.

One test found no statistical difference between the toxicity of the tailings and associated undiluted residual milling reagents, as compared to the lake's natural sediment. JA156a. And although another test indicated that the undiluted residual reagents might have potential toxicity, the State does not view that test as significant in part because that material will always be substantially diluted during operations. *Id.* The fill would increase pH and aluminum levels around the discharge source, but they would be "rapidly neutralized" and would "decrease to natural levels" because of "geochemical interactions and intermixing with [lake] water." SER747. Thus, it is anticipated that any toxic effects around the discharge pipe will dissipate very rapidly. JA483a (District Court finding).

Because of its relatively inhospitable characteristics, Lower Slate Lake is a "limited habitat * * * [with a] non-diverse, sparsely populated, assemblage of small fish." JA129a. Much of the lake does not support life due to its depth and topography. JA137a. Because the tailings fill will have minimal impact on the chemical composition of the water in Lower Slate Lake, its impact will be physical not chemical. SER961. Thus, it has been estimated that most aquatic life in the lake would be lost initially due to the fill characteristics of the tailings, rather than to any toxicity. JA483a. The benthic (bottom-dwelling) aquatic life would simply be covered by the fill material, *id.*, as would be expected from a large-scale fill operation.

The approved plan, however, requires restoration of the lake in a way that would "provide at least equivalent aquatic habitat and productivity as it does currently." JA484a. In fact, the new shallower depth of Lower Slate Lake resulting from the tailings deposit could make the environment friendlier to growth of organism populations. JA137a-40a; SER748. "[S]ome colonization of the shallower tailings would occur after [mine] closure and * * * conditions would improve in time so that the overall productivity of the closed facility could be higher than currently present." *Id.* And "over an extended period, the tailings would be covered by natural materials" entering the lake from its tributary creek. SER750. In case estimates are incorrect, however, Coeur is prepared to cap the tailings with native materials. *Id.* Thus, even though there likely will be some short-term loss of productivity, "because this is a largely isolated population and lake productivity will be restored, the State considers this temporary loss to be acceptable." SER 755. The National Marine Fisheries Service also found that the tailings discharge is not likely to jeopardize protected marine mammals or destroy or adversely modify designated critical habitat. SER825.

The approved plan also requires Coeur to engage in extensive activities to mitigate any environmental effects. These include methods to filter out and confine suspended particles, as well as adding non-toxic precipitates to promote rapid settling of the tailings. JA275a, 388a, 481a. As a result, the "settled tailings will not re-suspend." SER960. Coeur has also posted a bond to assure compliance with an approved reclamation plan and with long-term maintenance and monitoring of the impoundment. JA484a n.25, JA255a.

The Corps has determined that the wet tailings storage would cause a permanent loss of only 3.44 acres of waters of the United States while greatly enlarging the lake's surface area. JA359a; SER862-63. By contrast, each of the dry tailings facility alternatives would cause a permanent loss of at least *108* acres of waters of the United States—five times the size of Lower Slate Lake—due to the necessary filling of wetlands prior to the tailings storage on the resulting dry land. JA365a; SER860-61. These wetlands would be replaced by an enormous stack of tailings, 100 to 150 feet high and thousands of feet in both width and length, that would be highly visible to cruise ships and others using nearby coastal waters. *See* JA193a-94a; SER669-70, 723, 725.

2. The Permits.

Because the plan involved fill material as expressly defined in the Fill Rule, *see* 33 C.F.R. § 323.2(e), (f), Coeur sought a Section 404 permit from the Corps. In May 2004, both EPA and the Corps "agree[d] that * * * the discharge of the mine tailings into the impoundment is subject to permitting under CWA section 404, which governs the discharge of dredged or fill material." JA143a. They further agreed that "the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J) do not apply to the placement of the tailings into the proposed impoundment." JA144a-154a. By contrast, they concluded that any discharge of pollutants coming *from* the impoundment to downstream water would require a Section 402 permit from EPA and would thus be subject to effluent limitations. *Id.* Ultimately, Coeur obtained both the 404 permit for

fill discharge into the lake impoundment and a 402 permit for discharge from the impoundment.

In December 2004, the Forest Service, with the Corps as a cooperating agency, issued a final supplemental environmental impact statement ("FSEIS") evaluating the various tailings storage options.[4] The FSEIS found that the plan that included using tailings as fill material in the lake "provide[d] the best combination of components to minimize ground disturbance, reduce impacts to wetlands, provide safe and efficient transportation of workers, and reduce on-site fuel storage with the related risk of fuel spills within the framework of existing laws, regulations, and policies while meeting the stated purpose and need." JA218a. The Corps subsequently adopted the FSEIS. JA342a.

In 2005, the Corps granted a Section 404 permit for the wet tailings facility. JA266a. After this litigation was filed, the Corps then suspended the permit to conduct yet another analysis, and issued a Revised Record of Decision ("ROD") in early 2006. The ROD concluded that using the tailings as fill in the lake, with proposed mitigation measures, is the "least environmentally damaging practicable alternative" and therefore the "environmentally preferable alternative." JA354a. Weighing the alternatives, the Corps determined that "[t]he permanent loss of wetland functions and values" in the proposed dry tailings facilities "is more damaging and outweighs the temporary losses to the lake and its associated values and functions" resulting from a wet tailings

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[4] The Forest Service was designated the lead agency for the environmental review because the mine is situated within the Tongass National Forest.

facility. SER872. The State agrees with that assessment. JA225a.

Although EPA differed with the Corps and the State over the preferable tailings disposal alternative, it did not exercise its veto right under Section 404(c) of the CWA. Instead, it granted Coeur a Section 402 permit for any discharges coming *from* the impoundment into downstream waters. JA342a. Under that permit, water from the tailings impoundment that is not recycled back to the mill will pass through a water treatment plant to ensure that water quality standards are met. JA344a. The EPA permit places limits on contaminant concentration and the tailings impoundment may not release any water containing "any floating solids, visible foam in other than trace amounts, or oily wastes that produce a sheen on the surface of the receiving water." JA321a-31a. Thus, the water coming from the tailings impoundment will not adversely affect downstream waters. JA197a.

As required by Section 401 of the CWA, the State further certified that the plan met its own water quality standards. JA256a-65a. The Project also received additional state and local permits. JA227a-28a. Collectively, these permits require extensive design and operating elements, as well as numerous monitoring and other requirements to protect water quality and the environment. *See, e.g.*, JA226a-27a, 261a-64a, 278a, 326a-31a; SER674-85.

D. The Decisions Below.

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively, "SEACC") sued the Corps in the District of Alaska to enjoin its grant of the permit. JA479a. The State, Coeur, and Goldbelt, Inc. (a local native

corporation that received a related permit) intervened as defendants. *Id.*

SEACC contended that Coeur's discharge of tailings into the impoundment could not be permitted because it allegedly does not comply with an EPA performance standard governing discharges of "process wastewater" from "froth flotation" mines like Coeur's. *See* 40 C.F.R. § 440.104(b)(1). The District Court, however, found the Corps' permit valid. JA495a. It summarily rejected SEACC's contention that EPA's permitting authority and effluent limitations applied, holding that "[i]f the permit was properly issued under § 404, those provisions of the CWA are inapplicable." JA488a n.35.

The Ninth Circuit reversed with directions to vacate the Corps' permit. Even though Section 404 authorizes the Corps to permit discharges of any fill material, and even though Section 404—unlike Section 402—does *not* require that such discharges follow EPA effluent limitations, the court held that the CWA unambiguously provides that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism" for the discharges at issue. JA533a. The Court further concluded that no such Section 402 permit could ever issue for the discharge of tailings, because the discharge could not meet the EPA effluent limitation generally mandating zero discharge of "process wastewater" from this sort of mine. JA537a, 550a.

Finally, the court held that the "regulatory history" showed that neither agency intended for the Corps to have permitting authority under Section 404 where a discharge is subject to an EPA effluent limitation. JA535a. Based on carefully selected snippets from agency statements and memoranda—rather than

actual regulations—the court held that "[t]he agencies could not have been more clear" in articulating their "preferred approach" that the Corps authority under Section 404 applies only to material not subject to EPA effluent guidelines. Pet. App. 29a.

This Court granted petitions for certiorari filed by both the State and Coeur. The federal government defendants are respondents supporting the petitioners on the merits.

SUMMARY OF THE ARGUMENT

The CWA is unambiguous: fill material is not subject to the Section 402 permitting scheme or EPA's effluent guidelines applied under it. And even if the statute were ambiguous on that point, dispositive deference is owed both to the agencies' division of regulatory responsibilities and to their interpretation of their own regulations. Accordingly, the Court should reverse the Ninth Circuit's judgment and uphold the permit authorizing what both the State and the Corps have found, after careful consideration, to be the most environmentally protective option for disposing of the tailings.

The plain language of Section 404 authorized the Corps to grant the permit at issue. The tailings discharge concededly involves "fill material" as the agencies have authoritatively construed that term. And Section 404 provides that the Corps "may issue" a permit for the discharge of that material, provided the discharge complies with the Section 404(b)(1) Guidelines and is not vetoed by EPA. There is no dispute that the permit at issue satisfies all requirements of Section 404. The Corps therefore did not exceed its authority in issuing it.

EPA's separate Section 402 permitting authority is inapplicable on its face. Section 402 allows EPA to grant permits "[e]xcept as provided in * * * [Section 404]," 33 U.S.C. § 1342(a), thereby confirming that the Corps, and not EPA, has exclusive permitting authority over fill material. And Section 404, unlike Section 402, does not mandate compliance with EPA effluent limitations. The disparate inclusion of such restrictions shows that Congress intended that these limitations be mandatory only in permits issued under Section 402 and not those issued under Section 404. Indeed, Congress has shown that it knows how to authorize the application of effluent limitations to other CWA permitting schemes when it wants to. It amended EPA's otherwise separate aquaculture permitting scheme to mandate compliance with Section 402, *see* 33 U.S.C. § 1328, and it expressly authorized EPA to apply one narrow set of effluent limitations to one kind of Section 404 material, *see* 33 U.S.C. § 1317(a)(5). But it did not require the Corps to apply the effluent limitation invoked by the Ninth Circuit in this case.

The provisions relied on by the Ninth Circuit—Sections 301(a), 301(e) and 306(e) of the CWA—do not provide otherwise. These sections merely clarify that effluent limitations are mandatory where other provisions of the CWA make them applicable. They do not answer the question here—whether effluent limitations are applicable in the first place to discharges of fill material under a permit that complies with all provisions of Section 404. They are not, as Sections 404 and 402 make clear.

The history of the CWA further confirms the Ninth Circuit's error. As originally proposed in the Senate, the CWA contained no Section 404 and would have

subjected fill material to EPA's permitting authority under Section 402 and to EPA-promulgated effluent limitations. The House bill, by contrast, would have continued the Corps' exclusive authority over fill material with only minimal EPA environmental oversight. A compromise was then reached in conference committee. As enacted, the CWA adopted the House approach giving the Corps exclusive authority over fill material, but modified it to give EPA environmental oversight *within* the Section 404 process, both through the Section 404(b)(1) Guidelines and through EPA's Section 404(c) veto right. The Ninth Circuit vitiated that compromise and instead imposed the very permitting scheme that Congress had rejected.

But even if the Court were to conclude that the CWA does not clearly mandate the interpretation reached by the agencies, the statute is at a bare minimum ambiguous, and the agencies' interpretation is entitled to deference. For more than 35 years, formal agency regulations have consistently provided that: (1) discharges of fill material do not require EPA permits; (2) all such discharges are subject instead to the Corps' authority under Section 404; and (3) such permits may be granted without strict adherence to EPA-promulgated effluent limitations.

That interpretation is reasonable in light of the statutory language and the inherent differences—recognized in *Rapanos* v. *United States*, 547 U.S. 715 (2006)—between the fill material regulated by the Corps and other pollutants regulated by EPA. Unlike more mobile pollutants subject to EPA regulation, fill material is typically stationary and displaces water. Thus, it is reasonable for the agencies to regulate fill material consistently based

on its environmental effects rather than its source. The Ninth Circuit's rule, while barring the lake discharge, would not prohibit Coeur from filling the entire lake (or another waterbody or wetlands) with dirt and rock not subject to effluent limitations and then dumping the similarly-constituted tailings on top. By contrast, the plan approved by the Corps subjects the lake discharge to stringent environmental controls while obviating the need to destroy at least 108 acres of wetlands in favor of an unsightly 100-foot-high tailings stack on the Alaskan coast. And downstream waters would be fully protected by EPA's Section 402 permit requirements, which apply to any discharges coming from the tailings impoundment.

Finally, the agencies did not commit plain error in interpreting their own regulations. The regulations have always provided that discharges of fill material are not subject to NPDES permitting requirements. Nothing in the snippets from regulatory preambles, responses to comments, and internal memoranda cobbled together by the Ninth Circuit is inconsistent with, much less overrides, the plain language of the regulations. To the contrary, the agencies made clear in 2002 that EPA has never subjected fill material to effluent limitations, and the statements relied on by the Ninth Circuit merely confirm that the Corps has exclusive authority over all discharges meeting the regulatory definition of fill material.

ARGUMENT

Under the familiar standards of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court "must give effect to the unambiguously expressed intent of Congress," but if the statute is "silent or ambiguous with respect to

the specific issue" the court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44. The Ninth Circuit held that the CWA unambiguously subjects a discharge of fill material to EPA's Section 402 permitting authority if the discharge is subject to an effluent limitation. But the CWA unambiguously provides that the Corps, not EPA, has exclusive permitting authority over all discharges of fill material, which are governed by separate regulations. However, even if the statute were not clear on that point, it is at the very least ambiguous and the Ninth Circuit erred by not deferring to the agencies' reasonable resolution of the issue, and by overriding their interpretation of their own regulations.

I. THE CWA IS UNAMBIGUOUS THAT THE CORPS HAS EXCLUSIVE AUTHORITY UNDER SECTION 404 TO PERMIT DISCHARGES OF FILL MATERIAL, SUBJECT TO EPA'S VETO RIGHT.

A. Sections 402 And 404 Are Separate Permitting Programs Governed By Different Regulations.

Section 404 provides that the Corps "may issue permits" for the discharge of "fill material" into specified disposal sites in U.S. waters if the sites comply with the Section 404(b)(1) Guidelines and EPA does not veto. 33 U.S.C. § 1344. The discharges at issue concededly constitute "fill material" as the agencies have authoritatively defined that term, and the Ninth Circuit did not hold (nor did SEACC argue) that that definition is invalid. Thus, the Corps properly issued a permit under Section 404, subject to stringent environmental controls.

The Ninth Circuit nevertheless held that the CWA carves out an exception to the Corps' authority to issue Section 404 permits when the fill material comes from a source that is subject to EPA's effluent limitations. If it does, according to the Ninth Circuit, the discharge of fill material must be permitted under Section 402, not Section 404. But nothing in the CWA exempts fill material from the Section 404 program based on where it comes from. Rather, the statute unambiguously allows the Corps to permit any discharge of fill material, provided the permit complies with the Section 404(b)(1) Guidelines and is not vetoed by EPA.

Sections 404 and 402 provide an unambiguous statement of Congress's intent. Far from carving out an exception to Section 404 for discharges that might otherwise implicate Section 402, Congress did the converse: it expressly carved out an exception to Section 402 for discharges—like the one at issue here—that are subject to Section 404. Thus, it is not surprising that in *Rapanos*, the plurality noted that Section 404 is a "separate permitting program" from Section 402, 547 U.S. at 744-45, and Justice Kennedy expressly recognized what the statute provides: "*[a]part from dredged or fill material,* pollutant discharges require a permit from the Environmental Protection Agency." *Id.* at 760 (emphasis added). The Ninth Circuit, by contrast, held that the discharges of fill material at issue here do require an EPA permit. JA533a.

Section 404 provides that the Corps "may issue" a permit for any discharge of dredged or fill material provided the requirements of that section are met. Yet the Ninth Circuit held that the Corps may *not* issue such a permit in this case even though every

requirement of Section 404 has concededly been met, and that Section 402 and EPA effluent limitations apply instead. That is wrong. In Section 402, Congress gave EPA authority to issue permits for discharges of pollutants *"[e]xcept as provided in * * * [Section 404]."* 33 U.S.C. § 1342(a) (emphasis added). This express exception thus makes clear that the two permitting schemes are mutually exclusive, and that fill material falls within the Corps' exclusive authority under Section 404 even if it might otherwise have fallen within EPA's authority under Section 402. Put another way, EPA may issue a permit for the discharge of any pollutant, except if the pollutant constitutes "dredged or fill" material and is thus subject to the Corps' permitting authority.

There is no other reasonable reading of these provisions. Indeed, Section 402 is one of several places in the CWA where Congress established a general power or requirement and then limited it by stating that it applies "except as provided in" another provision. For instance, Section 404 itself exempts some discharges from all permitting requirements "except as provided in" the next paragraph, which requires a permit if the discharge intentionally impairs the flow or circulation of the navigable water. 33 U.S.C. § 1344(f).[5] In each of these sections, just as in Section 402, Congress made

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[5] *See also* 33 U.S.C. § 1311(j)(1)(A) (time limits apply to applications to modify certain effluent limitations "except as provided in" provisions for extending the deadline), 33 U.S.C. § 1322(f)(1)(A) (states may not regulate marine sanitation devices "except as provided in" separate section allowing such regulations if they are more stringent than federal standards); 33 U.S.C. § 1365 (citizen may commence civil action under the CWA "except as provided in" the next section, which imposes notice and opportunity to cure requirements).

clear that an action that would otherwise be authorized is not authorized if it falls within the ambit of another provision. The exception for Section 404 in Section 402 would be meaningless if EPA could issue a Section 402 permit for a discharge that meets the criteria of Section 404.

Moreover, Congress explicitly required that permits granted by EPA under Section 402 comply with EPA effluent limitations promulgated under Sections 301 and 306, *see* 33 U.S.C. § 1342(a)(1)(A), but placed no such restriction in Section 404. Instead, Section 404 permits must comply only with the separate Section 404(b)(1) Guidelines. As the Ninth Circuit itself recognized, JA531a-32a, "if 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006) (quoting *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997)).

Thus, when Congress enacts a restriction in one section of a statute but not in a closely related section the restriction is not intended to apply to the latter. For example, in *Russello* v. *United States*, 464 U.S. 16 (1983), the Court rejected an argument that the RICO forfeiture provision, 18 U.S.C. § 1963(a)(1), reaches only an interest in a RICO "enterprise," holding that "[h]ad Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2)." *Id.* at 18. *See also United States* v. *Granderson*, 511 U.S. 39, 63-64 (1994) (Kennedy, J. concurring) (presumption that disparate inclusion of terms is intentional is

stronger when the two provisions are closely related). So too here: Congress's express inclusion of effluent limitations in Section 402 but not the closely related Section 404 shows that it did not intend to apply those limitations to the latter permitting scheme.

Congress has demonstrated that it knows how to apply effluent limitations to a separate permitting scheme when it wants to. Section 318 of the CWA, 33 U.S.C. § 1328, allows EPA to issue permits for aquaculture projects, and just like Section 404 it is also an express exception to Section 402. *See* 33 U.S.C. § 1342 ("Except as provided in sections [318] and [404] * * *."). As originally enacted, Section 318 provided only that the EPA Administrator was to "establish * * * procedures and guidelines he deems necessary to carry out this section." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 318, 86 Stat. 877. But in 1977, Congress amended that section to provide that aquaculture permits must be issued "pursuant to [Section 402]" and that the regulations "shall require the application to such discharge of each criterion, factor, procedure, and requirement applicable to a permit issued under [Section 402], as the Administrator determines necessary to carry out the objective of this chapter." 33 U.S.C. § 1328(b) (amended by Clean Water Amendments of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599). Congress, however, has provided no such language in Section 404, even though it amended that section in the same law and since then. *See* Pub. L. No. 95-217, § 67 (1977), 91 Stat. 1600; Water Quality Act of 1987, Pub. L. No. 100-4, § 313(d), 101 Stat. 45 (1987).

Moreover, far from mandating that all effluent limitations be applied to dredged or fill material,

Congress specifically authorized EPA, in its discretion, to subject dredged (but not fill) material to one narrow category of effluent limitations. In Section 307 of the CWA, which authorizes EPA to establish effluent standards or prohibitions for specified toxic pollutants, Congress provided that "[a]ny disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army." 33 U.S.C. § 1317(a)(5). That Congress specifically provided that only one kind of effluent limitation "may" be applied to dredged material, and then only after consultation with the Secretary of the Army, demonstrates clearly that Congress did not intend to mandate that all effluent limitations automatically apply to all discharges of dredged and fill material.[6]

Congress expressly restricted EPA's Section 402 permit authority with Sections 301 and 306's effluent limitations. Just two sections later, Congress did not impose the same limits on the Corps' parallel permit program. And Congress has shown that it knows how to authorize EPA to apply effluent limitations

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6 That is not to say that EPA and the Corps lack discretion to incorporate effluent limitations, where appropriate, into the Section 404(b)(1) Guidelines. The Guidelines have long prohibited discharges that violate Section 307 toxic effluent standards or prohibitions. *See* 40 C.F.R. § 230.10(b)(2). Even though EPA had not exercised its authority to apply the limitations directly to dredged material under Section 307(a)(5), the Guidelines incorporate them because these toxic substances "are a primary concern in the evaluation of the effects of proposed discharges of dredged or fill material under section 404 of the Act." 44 Fed. Reg. 54,222, 54,235 (1979). Tellingly, however, the Guidelines do not incorporate, reference, or mandate the effluent limitation applied by the Ninth Circuit in this case.

both to a separate permitting scheme and to Section 404 material itself. The only reasonable conclusion is that Congress did not intend those limits to apply to Section 404 permits.

B. The Provisions Relied On By The Ninth Circuit Do Not Provide Otherwise.

The CWA provisions relied on by the Ninth Circuit—Sections 301(a), 301(e) and 306(e)—do not establish the invalidity of the permit at issue. Rather, as applicable here Section 301(a) provides only that a discharge of fill material must have a Section 404 permit. And Sections 301(e) and 306(e) simply provide that effluent limitations must be applied in accordance with the provisions of the CWA and only where applicable. For the reasons set forth above, they do not apply to discharges of fill material permitted by the Corps under Section 404.

Section 301(a). Section 301(a) provides that "[e]xcept as in compliance with this section and [CWA] sections 302, 306, 307, 318, 402, *and* 404 * * *, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (U.S. Code sections replaced with CWA sections) (emphasis added). According to the Ninth Circuit, the use of the word "and" means that any discharge has to comply with everything in *all* of the listed sections, including the effluent limitations of Sections 301 and 306. JA531a.

The word "and" cannot bear the weight put on it by the Ninth Circuit. *See, e.g., United States* v. *Fisk*, 70 U.S. 445, 447 (1866). The numerous statutes cited in Section 301(a) cover different—and often mutually exclusive—ground. All discharges cannot comply with *all* of the provisions cited—they can only comply with the applicable ones. For example, Section

301(a) refers to CWA § 318, which authorizes permits for the very narrow set of discharges "associated with an approved aquaculture project." 33 U.S.C. § 1328. Obviously, not all discharges need to comply with that provision. Similarly, Section 301 effluent limitations and Section 306 performance standards do not apply to the same discharges, since the former govern existing sources and the latter govern new ones.

There is nothing unusual or ungrammatical about this commonsense reading of the statute. For example, if a hypothetical statute were to prohibit an action "except as in compliance with the Rules of Civil and Criminal Procedure," it plainly would not require compliance with *both* sets of rules, but rather only the applicable one. The same is true here. Indeed, even SEACC concedes that "not every one of the enumerated provisions in Section 301(a) applies to every discharge." SEACC Opp. to Pet. for Writ of Cert. 20. Similarly, the Ninth Circuit stated that "[t]he use of 'and' as a connector * * * indicates that Congress intended for effluent limitations and standards of performance to apply to all *applicable* discharges." JA531a (emphasis added). But that is the same as saying that effluent limitations apply to discharges they are applicable to. That tautology begs the question of whether those limitations are applicable in the first place to discharges of fill material subject to the Corps' permitting authority under Section 404. Unlike in Section 402, Congress did not make effluent limitations applicable to permits for fill material granted under Section 404, and Section 301 does not provide otherwise.

In fact, Section 301(a) is ultimately satisfied regardless of how one reads it. For Congress has

expressly provided that compliance with a Section 404 permit "shall be deemed compliance" with all of Section 301 for purposes of both governmental and citizen enforcement. *See* CWA § 404(p), 33 U.S.C. § 1344(p) ("Compliance with a permit issued pursuant to this section * * * shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with section[] 1311 * * * of this title.").[7] Thus, where, as here, a permit has been issued under Section 404, Congress has "deemed" compliance with that permit to be compliance with all provisions of Section 301, necessarily including Section 301(a). Given that Section 404(p) precludes Section 301(a) from being enforced against Coeur's discharges of fill material pursuant to its Section 404 permit, Section 301(a) cannot be grounds to invalidate that permit here.

In any event, even if the Ninth Circuit were correct that Coeur's proposed discharges must comply with everything in Sections 301, 306, 402 and 404, its permit would still be valid. The requirements of Section 404 have concededly been satisfied. Because Section 402 contains an exception for situations covered by Section 404, there has in fact been compliance with Section 402 as well. And as next shown, the permit contravenes no express requirement of Sections 301 or 306.

Sections 301(e) and 306(e). The Ninth Circuit's reliance on Sections 301(e) and 306(e) is flawed for similar reasons. These provisions mandate application of effluent limitations only "in accordance with the provisions of [the CWA]," 33 U.S.C. § 1311(e), or where a source would "violate" an "applicable"

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[7] The cited sections, 33 U.S.C. §§ 1319 and 1365, contain the provisions for enforcement of the CWA.

performance standard. 33 U.S.C. § 1316(e). As such, they do not decide the question in this case or override the plain language of Sections 402 and 404.

Section 301(e) provides that "[e]ffluent limitations * * * shall be applied to all point sources of discharge of pollutants *in accordance with the provisions of [the CWA]*." 33 U.S.C. § 1311(e) (emphasis added). Thus, one must look to *other* provisions of the CWA to determine whether effluent limitations apply.[8] There is no dispute that effluent limitations are applied where a discharge is subject to permitting under Section 402 because Section 402 says that. But where a discharge constitutes fill material, it is expressly exempt from Section 402 and nothing in Section 404 or any other provision of the CWA requires application of effluent limitations. Section 301(e) adds nothing to that analysis.

Likewise, Section 306(e) states only that it is unlawful to operate a new source in "violation" of any EPA-promulgated performance standard "applicable to such source." 33 U.S.C. § 1316(e). This provision

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[8] Congress used similar language throughout the CWA, and in every case the added language acts as a limitation on a more general proposition. *See, e.g.*, 33 U.S.C. § 1311(g)(4)(A) (limiting EPA's power to add to list of pollutants "in accordance with the provisions of this paragraph"); 33 U.S.C. § 1320(c) (limiting EPA's implementation of hearing board decisions "in accordance with the provisions of this chapter"); 33 U.S.C. § 1322(g)(2) (requiring Coast Guard to certify sanitation devices if it determines "in accordance with this paragraph" that they meet certain standards, which in turn limit the certification authority by requiring specific tests); 33 U.S.C. § 1325 (limiting salaries of certain personnel "in accordance with the provisions" of general pay rates), 33 U.S.C. § 1342 (limiting revocation, modification, or suspension of Refuse Act permits "in accordance with the provisions of this chapter").

states only that a discharge cannot violate an *applicable* performance standard. It says nothing about whether such standards are actually applicable, or have been violated, when dredged or fill material is discharged under a permit meeting all the criteria of Section 404. As shown above, while Congress made performance standards applicable to discharges subject to permitting under Section 402, it did not make them applicable to discharges of fill material subject to permitting under Section 404. And even if that were not so as a statutory matter, Section 306(e) sets no standards of its own but rather delegates that duty to EPA, thus providing EPA with authority to decide when a discharge is subject to a performance standard within its authority. As noted above, EPA's regulations have expressly provided for more than 35 years that all discharges of dredged or fill material are exempt from NPDES permitting requirements. *See* 40 C.F.R. § 122.3(b). That longstanding regulatory determination is itself dispositive of the issue.

Finally, as noted above, the immunity provision of Section 404(p) provides that compliance with a Section 404 permit is "deemed compliance" for enforcement purposes with Section 301(a). *See* 33 U.S.C. § 1344(p). Section 301(a), in turn, provides that any discharge of pollutants must comply, *inter alia*, with Section 306 to the extent applicable. *See* 33 U.S.C. § 1311(a). Therefore, compliance with a Section 404 permit necessarily constitutes compliance with Section 306, even if that provision were otherwise applicable to the discharges at issue.

Nor is there any merit to the Ninth Circuit's view that, if fill material were not subject to effluent limitations, Congress would have "written § 301 and

§ 306 within § 402, not as separate sections." JA532a. The CWA is a complex statute with numerous interlocking provisions, and both Sections 301 and 306 do more than impose effluent limitations. Section 301(a), for example, contains the basic prohibitory provision of the CWA, and Section 306(c) provides for state enforcement. Thus, writing those sections into Section 402's permitting requirement would not make sense, and nothing can be gleaned from the decision to codify those effluent limitations in separate sections rather than as subsections of Section 402.

The agencies' interpretation does not—as the Ninth Circuit claimed—render sections 301(e) and 306(e) "effectively meaningless." JA532a. These provisions make clear that effluent limitations are mandatory where they apply. This encompasses a wide range of sources and discharges of effluent under the Section 402 permit program. Thus, the Court has held that Section 306(e) evidences Congress's intent that performance standards operate as "absolute prohibitions" not subject to exceptions or variances. *E. I. Du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977). But nothing in these statutes provides that effluent limitations are applicable in the first place to discharges of fill material permitted under the separate Section 404 program.

C. The History Of The CWA Confirms The Corps' Exclusive Permitting Role.

Although the plain language of the statute is dispositive, the history of the CWA confirms that Congress never intended for effluent limitations to apply to fill material. *See, e.g.*, *Chevron*, 467 U.S. at 843 n.9 (clarity of statute is to be determined by "employing traditional tools of statutory

construction"). Section 404 was a compromise between those in Congress who wanted to subject all discharges—even of dredged or fill material—to exclusive EPA regulation via effluent limitations, and those who wanted to continue the Corps' traditional regulation of such discharges. Under the compromise, the Corps retained its exclusive permitting authority but EPA was given environmental oversight *within* the Section 404 process. The Ninth Circuit's decision nullifies this carefully crafted legislative compromise.

1. The Corps' Pre-Existing Authority To Permit Discharges Of Mine Tailings.

For more than 120 years, the Corps has had express statutory authority to permit the disposal of mine tailings in the navigable waters of the United States. In 1886, even before it granted more general authority to regulate discharges into navigable waters, Congress authorized the Secretary of the Army to permit the "deposits of debris of mines" within established harbor lines and "under regulations to be from time to time prescribed by him." Rivers and Harbors Appropriations Act of 1886, 24 Stat. 329. That statutory authority has never been repealed, and is presently codified at 33 U.S.C. § 407a. The purpose of this legislation was to allow the Secretary to prevent obstructions to navigation and downstream nuisances caused by mine debris discharges, particularly the afterwash from hydraulic mining. *See* 17 Cong. Rec. 6827-29 (1886) (statements of Sen. Stanford).[9]

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[9] In 1893, the Corps was also given the specific authority to regulate discharges of mine tailings into the waters of the mining areas of California, including by imposing permit conditions requiring impoundment dams or other restraining

In response to this Court's 1888 ruling that no federal common law prohibits obstructions and nuisances in navigable waters, *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888), Congress determined that the Corps needed additional broad statutory authority to regulate such discharges. It therefore passed a series of laws that were later reenacted as the Rivers and Harbors Act of 1899 ("RHA"). *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 663 (1973).

The RHA, which is still in force today, *see* 33 U.S.C. § 401 *et seq.*, includes the Corps authority, in RHA § 403, to oversee permits for the deposit of fill in navigable waterways. *See* 33 U.S.C. § 403. It also includes a separate provision, commonly known as the Refuse Act, which authorized the Corps to regulate discharges of refuse. *See* 33 U.S.C. § 407. With this legislation, Congress sought to prevent injury to U.S. waters "caused in part by obstacles that impeded navigation and in part by pollution." *United States* v. *Standard Oil Co.*, 384 U.S. 224, 229 (1966).

Prior to the CWA, the Corps issued permits for the deposit of mine tailings under RHA § 403 rather than the Refuse Act. *See, e.g.*, *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 530 (8th Cir. 1975) (Section 403 permits issued for discharge of tailings into Lake Superior). But the Section 403 process was inadequate, because it focused on navigational

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works and settling reservoirs. *See* 33 U.S.C. §§ 661 et seq. (establishing California Debris Commission composed of Corps officers). This statutory authority also still exists, having been transferred to the Secretary of the Army in 1986. *See* Water Resources Development Act of 1986, Pub. L. 99-662, tit. XI, § 1106, 100 Stat. 4229 (1986).

rather than environmental issues. *See id.* at 531. Congress's solution was Section 404 of the CWA, which continued to vest the Corps with exclusive jurisdiction over discharges of fill material but incorporated EPA's environmental oversight through its promulgation of the Section 404(b)(1) Guidelines and its Section 404(c) veto right.

2. The CWA Compromise.

The separate CWA permit programs under Sections 402 and 404, and the agencies' duties under them, were a compromise reached during the conference between the House and the Senate. As reported out of committee, the initial Senate bill placed *all* discharges—including of dredged and fill material—under EPA's Section 402 permitting authority, including its effluent limitations. *See* S. 2770, 92nd Cong. § 402 (as reported by S. Pub. Works Comm., Oct. 28, 1971). A proposal on the Senate floor would have given the Corps exclusive authority to issue permits for the discharge of dredged material under a new Section 404, with the proponent explaining that, under this provision, "[t]he Secretary of the Army will not be obligated to require strict compliance with the effluent requirements established by the [EPA]." 117 Cong. Rec. 38854 (1971) (statement of Rep. Ellender). That proposal was defeated in the Senate, in favor of an amendment to Section 402 that would have involved the Corps in the EPA permitting process for discharges of dredged material. *See* 117 Cong. Rec. 38856, S38883 (1971); S. Rep. No. 92-414, at 71 (1971).

By contrast, the bill that passed the House contained Section 404, which gave the Corps sole authority over dredged or fill material, subject to

only minimal input from EPA. *See* 118 Cong. Rec. 10632 (1972). Under that bill, the Corps would have been required to "consult" with EPA and EPA could veto a disposal site for "critical areas," but the Corps could override that veto upon certain findings. *Id.* There was no provision for EPA to promulgate separate Section 404 guidelines. Because the House bill added this separate permitting authority, Section 402 of that bill (unlike its Senate counterpart) contained the explicit exception for Section 404. *Id.* at S10630. EPA opposed the Section 404 permitting process in the House bill, on the view that "all permits * * * should either be issued by EPA or subject to EPA review and concurrence with respect to environmental considerations." H.R. Rep. No. 92-911 at 168 (1972) (comments of EPA).

Congress resolved the dispute through a compromise reached in conference. The conference substitute, which became the CWA, adopted the House bill as modified by EPA's second suggested alternative. It adopted the House's provision for Section 404 as a stand-alone permitting authority that is separate, and specifically exempted, from Section 402. But in order to satisfy the Senate's and EPA's concerns about the need for EPA environmental oversight of the Section 404 process, the compromise added two provisions to the House bill: EPA's authority to promulgate the Section 404(b)(1) Guidelines and its Section 404(c) veto right. Neither of these provisions had appeared in either the House or Senate versions of the CWA.

Senator Muskie, on behalf of the House-Senate conferees, explained the rationale for the compromise:

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently

> handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed. At the same time, the Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination [sic] as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site.

118 Cong. Rec. 33692, 33699 (1972) (analysis of bill prepared by Sen. Muskie).

The Ninth Circuit's interpretation vitiates this compromise and instead adopts the rejected approach of the initial Senate bill, under which fill material would have been treated as just another pollutant subject to the Section 402 permitting process and EPA-promulgated effluent limitations. Congress, however, explicitly rejected that approach. Its decision to give both EPA and the Corps authority in the Section 404 permitting process was a means to efficiently address both environmental and physical concerns, using the agencies' respective expertise. Indeed, while the EPA was only two years old when the CWA was enacted, the Corps had more than seventy years of experience administering permits for dredged and fill material, including mine tailings. Congress intended to complement that experience with EPA environmental review *within* the Section 404 process, in the form of both separate guidelines developed specifically for dredged and fill material, and EPA's veto right. This Court should apply the CWA as Congress intended.

II. THE AGENCIES REASONABLY RESOLVED ANY AMBIGUITY.

As shown above, the CWA is unambiguous that dredged and fill material subject to permitting under Section 404 is not subject to Section 402 or to the effluent limitations applied by EPA thereunder. But if at a bare minimum the statute is ambiguous on that point, then the Ninth Circuit erred in not deferring under *Chevron* to the agencies' reasonable resolution of their statutory duties.

In 1973, only a year after the enactment of the CWA, EPA promulgated a notice-and-comment regulation—which is still in place today—providing that all dredged and fill material is exempt from all NSDES permitting requirements that are applied to other kinds of pollutants. *See* 38 Fed. Reg. 13530 (1973) (codified as amended at 40 C.F.R. § 122.3(b)). Nearly 30 years later, both agencies confirmed, again after notice and comment, that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (2002) (emphasis added). Thus, as the agencies stated, the Fill Rule "determines the basic jurisdiction of the section 404 versus the section 402 program." *Id.* at 31,133. Similarly, the Section 404(b)(1) Guidelines, developed by EPA and the Corps after notice and comment, have never required application of EPA effluent limitations such as the one invoked by the Ninth Circuit here.

Under *Chevron*, these formal statements of agency policy are conclusive so long as they are reasonable. 467 U.S. at 843-44. As the Fourth Circuit has noted in upholding EPA's and the Corps' delineation of their respective CWA authorities, "the resolution among agencies of the line dividing their

responsibilities is just the type of agency action to which the courts must defer." *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425, 446 (4th Cir. 2003). Indeed, even if the agencies' positions had not been arrived at through notice and comment rulemaking, *Chevron* deference would still be warranted given the "interstitial nature of the legal question, the related expertise of the [agencies], the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [agencies have] given the question over a long period of time." *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002).

To sustain the agencies' position the Court "need not find that it is the only permissible construction that [they] might have adopted but only that [their] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment * * *." *Chemical Mfrs. Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985). The determination at issue easily meets that deferential standard.

1. The agencies' resolution of any ambiguity is unquestionably reasonable in light of the statutory scheme. Indeed, neither SEACC nor the Ninth Circuit ever addressed the issue, focusing instead on the erroneous view that the statute unambiguously prohibited the permit. For the reasons set forth above, the language of the statute, even if ambiguous, reasonably supports a construction under which the Corps has exclusive authority to issue permits for discharges of dredged or fill material, subject only to the requirements of that section and not EPA's separate effluent limitations. Indeed, the very fact that Congress established Section 404 as a stand-alone permitting scheme

separate from Section 402 indicates that it is reasonable for the agencies to subject discharges of dredged and fill material to different standards.

National Ass'n of Home Builders v. *Defenders of Wildlife* 127 S. Ct. 2518 (2007) ("*NAHB*")—issued after the Ninth Circuit ruled in this case—is instructive. In *NAHB*, this Court reversed a Ninth Circuit decision that failed to defer to agencies' determinations of their respective jurisdictions involving the CWA. The Ninth Circuit had held that before transferring Section 402 permitting authority to a state, EPA must comply with a provision of another statute (the Endangered Species Act ("ESA")) administered by a different agency. This Court held that the ESA provision must be read against CWA provisions "whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below." *Id.* at 2534. As a result, the Court was "left with a fundamental ambiguity that is not resolved by the statutory text" because "[a]n agency cannot simultaneously obey the differing mandates." *Id.* Given that "the statutory language * * * [did] not itself provide clear guidance as to which command must give way," the Court found it "appropriate to look to the implementing agency's expert interpretation," which "harmonizes the statutes." *Id.* Because the interpretation was "reasonable in light of the statute's text and the overall statutory scheme," the Court held that it was "entitled to deference under *Chevron*." *Id.*

Even accepting the Ninth Circuit's flawed reasoning, there are conflicting statutory mandates here. Section 404 clearly provides that the Corps may issue permits for the discharge of the fill material at issue here, and Section 402 prohibits

EPA from regulating discharges provided for in Section 404. But, according to the Ninth Circuit, other provisions say that EPA must regulate this discharge of fill material under Section 402. Even if that were right, there would be "a fundamental ambiguity that is not resolved by the statutory text" because the agencies "cannot simultaneously obey the differing mandates." *NAHB*, 127 S. Ct. at 2554. Thus, as in *NAHB*, the agencies' resolution of this purported conflict, which "harmonizes the statutes," *id.* at 2534, is entitled to deference. That "resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to * * * administrative leeway." *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 85 (2002).

2. The agencies' interpretation is also reasonable given the inherent differences between fill material regulated by the Corps through the Section 404 program and the kinds of pollutants regulated by EPA through the NPDES program. Unlike discharges that are covered by Section 402, filling involves alteration of the water body itself in the course of necessary economic activity. Discharges that fill a waterbody with stationary material present different regulatory concerns from discharges of mobile pollutants likely to find their way downstream, and it is reasonable for the agencies to treat these discharges differently.

As the agencies stated when they proposed the latest iteration of the Section 404(b)(1) Guidelines:

> Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself. For this reason,

> the section 404 permitting process focuses on different considerations than the section 402 permitting program.

65 Fed. Reg. 21,293 (2000).

In connection with the proposed Fill Rule, the agencies further noted that "in assigning a discharge to section 404 versus section 402 permitting, it is important to apply the regulatory regime that is in fact best-equipped to consider and control the impacts of the potential discharge." JA37a-38a. The primary effect of fill material is to "displace or change the elevation of receiving water—often replacing it with dry land." JA47a. Thus, the agencies set the division between them based on the effects of fill material to "ensure that discharges with similar environmental effects will be treated in a similar manner under the regulatory program." 67 Fed. Reg. 31,133.

Because of the different policy considerations applicable to fill material, Section 404 permitting is in many respects *more* rigorous than NPDES permitting. For example, unlike Section 402, Section 404 requires consideration of alternatives to the proposed discharge. Section 404 requires criteria comparable to those governing ocean discharges under Section 403, *see* 33 U.S.C. § 1344(b)(1), and Section 403 expressly requires consideration of "other possible locations and methods of disposal or recycling of pollutants including land-based alternatives." 33 U.S.C. § 1343(c)(1)(F). *See also* 40 C.F.R. § 230.5(c). Thus, while the Section 404(b)(1) Guidelines include water quality criteria, they also "go beyond such a water quality based approach to require numerous additional considerations before a section 404 permit may be issued." 65 Fed. Reg. 21,293. In this case,

the Corps examined 20 different factors in making its Section 404 determination. JA343a.

Far from being unreasonable, the basis for the agencies' differential treatment of fill material was expressly recognized in *Rapanos*:

> In contrast to the pollutants normally covered by the permitting requirement of [Section 402(a)], "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream * * *. *The Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)].*

Rapanos, 547 U.S. at 744-45 (plurality).

As noted in *Rapanos*, this dichotomy is part of the basic structure of the CWA. "[F]rom the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream" is generally prohibited by Section 301 without a Section 402 permit from EPA. *Id.* at 743 (emphasis removed). Thus, "the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an 'addition * * * to navigable waters'"—the definition of a discharge of pollutants subject to permitting under Section 402—"while the deposit of *stationary* fill material generally is not." *Id.* at 745 n.11 (quoting 33 U.S.C. § 1362(12)) (emphases in original).

Given these recognized distinctions, the agencies' determination that permitting fill material does not mandate strict application of EPA effluent limitations is eminently reasonable. Under the Ninth Circuit's interpretation, fill material would be regulated under Section 402 whenever it comes from a regulated point source, JA531a, thereby requiring

the agencies to categorize discharges between Section 404 and 402 based on where they come from, not what effect they have on the environment.

For example, a discharge of fill materials of the same mineral and chemical composition as the tailings at issue here could be permitted under Section 404 as long as the fill did not come from a mine or other regulated point source. The impact on the waterbody would be exactly the same, yet the discharge would be entirely prohibited in one situation and permitted in the other. Similarly, the Ninth Circuit's approach would allow the Corps to authorize Coeur to fill the entirety of Lower Slate Lake (or an equivalent surface water) with material not subject to EPA limitations, and then pile the tailings on the resulting dry land. Yet that interpretation does not allow the less intrusive action of partly filling the lake with the tailings. The Ninth Circuit's permitting scheme defies common sense. *Cf. Standard Oil*, 384 U.S. at 226 (distinguishing between pollutants based on the source and intent of the discharge under previous water quality statute was "a narrow, cramped reading * * * in partial defeat of its purpose").

By contrast, under the agencies' and the State's approach, fill material is treated as such regardless of where it comes from. Mining by-products, such as tailings, "may have a slightly different physical form from the traditional rock and soil used as fill material, but [they] can have the same effect on the aquatic environment as those materials." JA93a. The Corps could thus conclude that using the tailings as fill in the lake is preferable to filling an even larger area of wetlands and then dumping the

tailings on top to create an unsightly 100-foot-high pile that would be highly visible to passing ships.

EPA's effluent limitations are also inherently ill-suited to the balancing of interests that Congress mandated with regard to fill material. *See* 33 U.S.C. § 1344(b)(1) (requiring consideration of criteria set out in 33 U.S.C. § 1343(c) that include "economic values" and "alternate uses" such as "mineral exploitation"). For example, EPA effluent limitations restrict "total suspended solids" (TSS) to no more than 30 milligrams per liter—*i.e.*, 30 parts per million—for this kind of mine. *See* 40 C.F.R. § 440.104. Fill material, by contrast, is largely solid. *See, e.g.*, JA482a; ER290, 302 (tailings slurry is 55% solid by weight). It makes sense to apply such effluent limitations when the primary concern is the quality of the water with which mobile, suspended pollutants are to be mixed. But it is entirely reasonable to adopt a different approach when stationary fill material will displace the water.

The reasonableness of this approach is further shown by the agencies' determination that discharges *from* the tailings impoundment into downstream waters require a Section 402 permit. The Section 404 permit contains requirements to keep the tailings as fill material and prevent them from re-suspending. JA275a-76a. But even though fill material typically stays put, it sometimes produces alluvium or silt that "makes its way downstream." *Rapanos*, 547 U.S. at 806 (Stevens, J., dissenting). In the event that water from the tailings impoundment is released past the dam, EPA's Section 402 permit imposes stringent limitations and treatment requirements to ensure that mobile pollutants do not make their way downstream.

In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court deferred to the Corps' interpretation of its Section 404 jurisdiction, holding that "we cannot say that the Corps' conclusion * * * —based as it is on the Corps' and EPA's technical expertise—is unreasonable." *Id.* at 134.[10] The same result should obtain here. Assuming *arguendo* that the Ninth Circuit was correct to ignore Section 402's explicit mandate—which one must do even to reach this issue—Congress did not address the dividing line between Sections 402 and 404 and left that determination to the expert agencies. As in *Riverside Bayview*, the agencies' resolution was based on their respective technical expertise and is reasonable. Their interpretation, supported by the State, recognizes the distinctive characteristics of fill material, but also ensures that fill discharges are subject to rigorous environmental review in the form of the Section 404(b)(1) Guidelines and EPA's veto right.

III. THE AGENCIES' INTERPRETATION OF THEIR OWN REGULATIONS IS NOT PLAINLY ERRONEOUS.

The Ninth Circuit erred still further by holding that the agencies incorrectly interpreted their *own* regulations as subjecting discharges of fill material to permitting under Section 404 rather than

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10 The Court has found that the Corps exceeded its Section 404 authority only where—unlike here—the agency "invoke[d] the outer limits of Congress' power" under the Commerce Clause. *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"); *see also Rapanos*, 547 U.S. at 724. In those circumstances, the Court has required "a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172.

Section 402. "An agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'" *NAHB*, 127 S. Ct. at 2537-38 (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). Such deference is "all the more warranted" in a case like this, where "the regulation concerns 'a complex and highly technical regulatory program.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (citation omitted). Deference is accorded even where "the structure of the regulations is less than clear," *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1155 (2008), and even where an agency's considered interpretation appears in a legal brief, *Auer*, 519 U.S. at 462. Under these standards, the agencies did not err in interpreting and applying their own regulations to allow the permit.

According to the Ninth Circuit, "unequivocal statements" by EPA and the Corps demonstrate that "both agencies intended for effluent limitations and performance standards to apply even to discharges that facially meet the definition of the term 'fill material.'" JA538a, 547a. In fact, the regulations unequivocally provide otherwise:

- For more than 30 years, EPA regulations have provided that discharges of fill material, without exception, "do not require NPDES permits." 40 C.F.R. § 122.3(b).
- The 2002 Fill Rule provides that any discharge of fill material will be subject to the Corps' jurisdiction under Section 404, and specifically provides that "discharge of fill material" includes the "placement of overburden, slurry, or tailings, or similar mining-related materials." 33 C.F.R. § 323.2(f).

- The Section 404(b)(1) Guidelines have never required application of EPA effluent limitations.

Because the plain language of the regulations is dispositive, there is no need to look further. But to the extent that there is any ambiguity as to whether the regulations subject the fill material at issue to the Corps' exclusive jurisdiction, the agencies dispelled that in 2002 by confirming unambiguously that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (emphasis added). *See also id.* at 31,133 (the Fill Rule "determines the basic jurisdiction of the section 404 versus the section 402 program"). And if that statement were not clear enough, they also made clear that "*any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material,'" and that "the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials." *Id.* (emphasis added). As the agencies explained, tailings "both have the effect of fill and are geological materials similar to many other types of fill material; we thus agree it is appropriate that they be regulated under section 404." JA44a.

Moreover, the agencies specifically changed language in the Fill Rule to preclude the very interpretation adopted by the Ninth Circuit. Faced with the possibility that "discharges [would be] excluded from section 404 coverage simply due to the presence of constituents in the material for which effluent limitation guidelines exist," the agencies eliminated a proposed provision stating that discharges covered by a Section 402 permit would not require a Section 404 permit. SER1018.

Although the Ninth Circuit strangely found that the agencies' removal of this language showed their intent to keep it, JA544a-45a, just the opposite is true.

The other materials relied on by the Ninth Circuit do not evince a contrary view of the statute, much less plain error in the agencies' interpretation of their regulations. The court relied on the agencies' statements, in promulgating the Fill Rule, that:

- the rule would not "change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402";
- "[i]f a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa";
- "if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid"; and
- "no discharges that were previously prohibited are now authorized as a result of this rulemaking."

JA543a-46a (quoting 67 Fed. Reg. 31,135; JA83a; JA48a; JA32a).

These statements, which are from either the preamble to the Fill Rule or the agencies' responses to comments on the proposed rule, cannot supersede the unambiguous language of the regulations. But regardless, nothing in the statements provides that EPA or the Corps must apply effluent limitations to discharges meeting their current definition of fill

material. As noted, the agencies stated in the very same proceeding that EPA had "never" done so. 67 Fed. Reg. 31,135. Indeed, the statement that "[i]f a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, *and vice versa*," JA83a (emphasis added), confirmed that fill material would *not* be subject to EPA permitting requirements under Section 402.

At most, the statements relied on by the Ninth Circuit stand for the truism that EPA effluent limitations will be applied when they are applicable. For example, EPA has clarified that the mere settling of waterborne pollutants over time would not turn them into fill material. *See* 67 Fed. Reg. 31,135 ("[r]ecognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to the settling of waterborne pollutants, we do not consider such pollutants to be 'fill material'"). But none of these statements provides that such limitations would be applied to discharges of fill material.

Even more off-base was the court's reliance on internal memoranda concerning other mine projects. *See* JA539a, 544a. Citing two internal Corps memoranda, the court noted that "[a]fter the adoption of the MOA in 1986, the Corps continually declined to exercise jurisdiction over mine tailings." JA539a. Again, these informal statements cannot override the plain language of the regulations. But these memoranda merely evidence disagreement among some agency personnel as to whether tailings were subject to Corps jurisdiction under the *old* fill definition, which exempted all discharges of "waste." *See* ER173 ("the tailings do not meet the Corps'

definition of fill material"); ER176-177. They nowhere state that EPA would have jurisdiction over discharges that meet the definition of fill material, and presume the opposite. Moreover, these memoranda were authored by subordinate officials who could not and did not speak for the Corps. For example, the latter memorandum merely "requests that the question be referred to the Washington level for resolution." ER178. Corps headquarters, with the concurrence of EPA, responded that "the potential impacts of the discharge of the mine tailings must be considered within the context of the section 404 permit evaluation." SER1062.

The Ninth Circuit's reliance on non-final decisions regarding the Kensington Project, *see* JA547a, was also misplaced. The court cited a 1998 Corps decision noting that "[t]he Corps does not regulate the placement of the tailings." ER257. But that decision referred to the *dry* tailings facility ("DTF"), where the tailings would have been placed on dry land not subject to Corps regulation. *Id.* The court's reliance on EPA's decision regarding its Section 402 permit, JA547a, is equally misleading. That decision referred not to discharges of the tailings themselves but to the discharges *from* the tailings impoundment to downstream waters, JA292a, which all parties agree are subject to EPA jurisdiction.

In any event, earlier agency statements are irrelevant because the Court is "empowered to review only an agency's *final* action." *NAHB*, 127 S. Ct. at 2530. The agencies' final action here was to agree that the discharge at issue was properly permitted under Section 404 as fill material. There was no ambiguity or disagreement about that issue. Applying the current Fill Rule to the Kensington

project, the agencies "agree[d] that * * * the discharge of the mine tailings into the impoundment is subject to permitting under CWA section 404," and that "the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining * * * do not apply to the placement of the tailings into the proposed impoundment. JA144a-154a (citing 40 C.F.R. Part 440, Subpart J). That interpretation of the regulations was not plainly erroneous and therefore warrants deference.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

33 U.S.C. § 1311 (CWA § 301)

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

33 U.S.C. § 1316 (CWA § 306)

National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

* * *

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

* * *

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of title 26 whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

33 U.S.C. § 1317 (CWA § 307)

Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

* * *

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

33 U.S.C. § 1328 (CWA § 318)

Aquaculture

* * *

(b) Procedures and guidelines

The Administrator shall by regulation establish any procedures and guidelines which the Administrator deems necessary to carry out this section. Such regulations shall require the application to such discharge of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title, as the Administrator determines necessary to carry out the objective of this chapter.

33 U.S.C. § 1342 (CWA § 402)

National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1344 (CWA § 404)

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites.

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites.

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site,

whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

* * *

(f) Non-prohibited discharge of dredged or fill material.

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which

does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

* * *

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant

to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

REGULATORY PROVISIONS

33 C.F.R. § 323.2

Definitions.

For the purpose of this part, the following terms are defined:

* * *

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and

dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See Sec. 323.4 for the definition of these terms). See Sec. 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

40 C.F.R. § 122.3

Exclusions.

The following discharges do not require NPDES permits:

* * *

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

40 C.F.R. § 230.1

Purpose and policy.

(a) The purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.

* * *

40 C.F.R. § 230.5

General procedures to be followed.

In evaluating whether a particular discharge site may be specified, the permitting authority should use these Guidelines in the following sequence:

* * *

(c) Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§230.10(a)).

* * *

40 C.F.R. § 230.10

Restrictions on discharge.

Note: Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement of these Guidelines will not automatically receive a permit.

Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

* * *

(b) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these

Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;

(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

40 C.F.R. § 232.2

Definitions.

* * *

Fill material. (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

40 C.F.R. § 440.104(b)(1)

New source performance standards (NSPS)

* * *

(b)(1) Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores. The Agency recognizes that the elimination of the discharge of pollutants to navigable waters may result in an increase in discharges of some pollutants to other media. The Agency has considered these impacts and has addressed them in the preamble published on December 3, 1982.

RESPONDENT'S BRIEF

Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

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Counsel for Respondent Goldbelt, Inc.

QUESTION PRESENTED

Respondent Goldbelt, Inc. supports and incorporates the questions presented in the petitions for a writ of certiorari filed by Coeur Alaska, Inc. and the State of Alaska.

PARTIES TO THE PROCEEDING

Respondent Goldbelt, Inc. adopts the statement of the parties to the proceedings in the petitions filed by Coeur Alaska, Inc. and the State of Alaska.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Goldbelt, Inc., intervenor-defendant-appellee below, is an Alaska Native urban corporation created pursuant to Section 14(h)(8) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(8). It is wholly owned by its Tlingit Indian shareholders. It has no parent corporation, and no publicly held corporation owns any of its shares.

TABLE OF CONTENTS

Page

REASONS FOR GRANTING THE PETITIONS 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Cases

City of Angoon v. Marsh,
749 F.2d 1413 (9th Cir. 1984).....2

Koniag, Inc. v. Koncor Forest Res.,
39 F.3d 991 (9th Cir. 1984).....2

Statutes

33 U.S.C. § 1344 1

43 U.S.C. § 1601 *et seq.* 2

BRIEF IN SUPPORT OF THE PETITIONS

Respondent Goldbelt, Inc. respectfully submits this brief in support of the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. Goldbelt adopts the Opinion Below, Jurisdiction, Statutory Provisions Involved, and Statement of the Case sections of the petitions filed by Coeur Alaska, Inc. and the State of Alaska.

Goldbelt is the permittee under United States Army Corps of Engineers Permit POA-1997-245-N, issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, to construct a marine terminal for the single purpose of providing mine worker shuttle services to Coeur's Kensington Gold Mine. Respondents Southeast Alaska Conservation Council, Sierra Club and Lynn Canal Conservation challenged Goldbelt's permit in the same proceeding that is the subject of the Petitions filed by Coeur and the State of Alaska. The Ninth Circuit Court of Appeals vacated Goldbelt's permit for the sole reason that its stated purpose supposedly failed as a result of the Court's ruling vacating Coeur's Section 404 permit for disposal of tailings from the Kensington Mine.[1] Alaska Pet. App. 31a–32a.

If this Court grants the Petitions and subsequently grants the relief requested by either Coeur

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[1] Goldbelt's dock permit was not tied to any method of tailings disposal. The Ninth Circuit arbitrarily assumed that Coeur will abandon the project if it cannot use the challenged method of tailings disposal.

or the State of Alaska on the merits, it should also reverse the Ninth Circuit's decision vacating Goldbelt's Section 404 permit.

REASONS FOR GRANTING THE PETITIONS

In addition to the reasons given by Coeur and the State of Alaska, this Court should grant the petitions because the decision of the Ninth Circuit Court of Appeals will deprive Goldbelt and its Tlingit Indian shareholders of the economic benefits intended by Congress when it enacted the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.*, and thus will deal a devastating blow to economically disadvantaged Tlingit Indians throughout northern southeast Alaska.

The Tlingit have lived in southeast Alaska from time immemorial. Their aboriginal territory included lands in and around Berners Bay, where the Kensington Mine is located. C.A. J.S.E.R. 1084.[2] When Congress enacted the landmark ANCSA in 1971, it granted Goldbelt, on behalf of its more than 3,000 Tlingit shareholders, the right to select 23,040 acres of land in partial compensation for the lands illegally taken from them by non-Native interlopers and the United States Government. *Id.* 1086. Congress intended that these lands would be used for economic development and betterment of Goldbelt's shareholders. *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 996–97 (9th Cir. 1984) (Congress expected and intended that Alaska Native Corporations would select their Settlement Act lands for economic development purposes); *City of Angoon v. Marsh*, 749 F.2d

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[2] "C.A. J.S.E.R." refers to the Joint Supplemental Excerpts of Record filed in the court of appeals.

1413, 1488 (9th Cir. 1984) (permitting Native Corporation to log ANCSA lands within Admiralty Island National Monument) ("it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands conveyed").

But when the Secretary of the Interior withdrew lands on Admiralty Island, the Sierra Club and others sued to block Goldbelt's selections. Unlike other Native Corporations, which successfully asserted their right to develop their lands within the National Monument, Goldbelt attempted to accommodate the environmental community by agreeing in 1979 to exchange its Admiralty Island selection rights for other lands thought to be less environmentally sensitive, including lands at Cascade Point on the southern shore of Berners Bay. C.A. J.S.E.R. 1086. These lands are on the Juneau road system and potentially very valuable. The City and Borough of Juneau has designated the lands around Cascade Point as a "new growth area," and Goldbelt has expended considerable time and effort in responsible land use planning for the area. *Id.* 1087. Unfortunately for Goldbelt, however, every single attempt to put these lands to productive use has been challenged and frustrated by the same groups that forced Goldbelt to abandon its selection rights on Admiralty Island. *Id.* As a result of the inequitable actions of the Sierra Club, SEACC, and Lynn Canal Conservation, the intent of Congress has been frustrated, and Goldbelt's lands on Berners Bay have lain unproductive for the past quarter century.

When Coeur announced its intent to reopen the historic Kensington Mine on the north shore of Bern-

ers Bay – which is accessible only by air or water – Goldbelt saw a perfect opportunity to develop its lands at Cascade Point on the south shore of the Bay as a marine terminal to provide mine worker shuttle services to the Mine. Goldbelt's proposal was treated as a component of the overall Kensington Plan of Operations, and was subjected to exhaustive environmental studies – none of which has been challenged by the Sierra Club, SEACC, or Lynn Canal Conservation.

The Army Corps of Engineers concluded that Goldbelt's dock proposal was the least environmentally damaging, practicable alternative for transporting workers to the mine site. C.A. J.S.E.R. 868. When the Corps issued its Section 404 permit for a marine terminal limited to mine shuttle operations, however, the Sierra Club, SEACC, and Lynn Canal Conservation filed suit alleging that Goldbelt's permit was inextricably linked by purpose to Coeur's Section 404 permit for tailings disposal and could not survive a successful companion challenge to Coeur's permit.

It would be difficult to overstate the importance of the Kensington Gold Project to the Tlingit Indians of the Juneau area. The Ninth Circuit's decision to vacate the Coeur and Goldbelt permits has done far more than unfairly dash Goldbelt's most recent attempt to use its ANCSA lands. It has struck a crippling blow to the economic aspirations of a generation of Tlingit Indians living in northern southeast Alaska.

Southeast Alaska generally has been hard hit by the decline of the timber and fishing industries. C.A. J.S.E.R. 1081. In the Juneau area, the economic downturn has been compounded by a contraction of

employment opportunities in the public sector. *See* C.A. Br. of the City and Borough of Juneau, as *Amicus Curiae* in Support of Defendants-Appellees 12. Economists estimate that the lack of decent paying jobs is resulting in a net out-migration of as much as 4500 persons a year from Southeast Alaska, especially in the 25- to 35-year-old range. *See* C.A. *Amicus Curiae* Br. of Southeast Conf. in Support of Defendants-Appellees 6 (the Southeast Conference represents the interests of thirty Southeast Alaska member communities, nine Alaska Native corporations, and numerous other private and public entities in the region).

The economic hard times have crippled the rural, largely Native, areas of Southeast Alaska where employment opportunities are virtually non-existent. *See* C.A. Br. of *Amicus Curiae* Berners Bay Consortium in Support of Appellees 4 (the Consortium is a coalition of Native Corporations and Coeur Alaska, Inc.). Although many of Goldbelt's shareholders reside in the Juneau area, their unemployment rates are two to three times higher than the rates for non-Natives. Much of the employment that is available to them is seasonal, low paying and without benefits. C.A. J.S.E.R. 1078–79.

From the outset, Coeur has recognized that the Kensington Mine lies at the heart of Tlingit traditional territory, and has taken truly extraordinary efforts to insure that Native Alaskans are included in the prosperity that the mine promises. These efforts not only have been exemplary, they are unprecedented. As one Tlingit leader put it:

> No other company . . . has ever worked so conscientiously as Coeur to involve the Natives of Northern Southeast

> Alaska in the planning of its activities, or been so diligent in its efforts to ensure that Alaska Natives are included in the economic benefits to be derived from its operations.

C.A. J.S.E.R. 1080.

Before the Ninth Circuit effectively shut down the Kensington Mine, Coeur had been training Alaska Natives for high-paying, full-time jobs in the mining industry. Roughly 25 percent of the construction workforce at the Kensington Mine was Alaska Native. Coeur had promised partnerships with Native Corporations, including Goldbelt, to provide goods and services – such as the mine shuttle service Goldbelt plans to operate from its Cascade Point terminal. C.A. J.S.E.R. 1079–80.

The optimism generated by Coeur's Native-friendly operations has been dashed by the Ninth Circuit's rulings. This Court should intervene – not only to correct an erroneous reading of the Clean Water Act – but to fulfill the quarter-century-old promise of Congress that the lands it intended for the economic benefit of the Tlingit Indians not be locked up in perpetuity by endless litigation intended to keep those lands in de facto wilderness status.

CONCLUSION

For these reasons and for the reasons set out in the petitions of Coeur Alaska and State of Alaska, the petitions for a writ of certiorari should be granted.

Respectfully submitted.

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February 11, 2008

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
SEP 17 2008
OFFICE OF THE CLERK

Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Respondent Goldbelt, Inc. ("Goldbelt") supports and incorporates the questions presented in the briefs on the merits filed by Coeur Alaska, Inc. ("Coeur") and the State of Alaska.

2. If this Court reverses the decision of the Ninth Circuit Court of Appeals vacating Coeur's 404 permit for tailings disposal in Lower Slate Lake, should it also reverse that Court's decision to vacate Goldbelt's 404 permit based solely on the erroneous assumption that the Cascade Point marine terminal is contingent upon Coeur's 404 permit and proposed method of tailings disposal?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondent Goldbelt, Inc. adopts the statement of the parties to the proceedings in the petitions filed by Coeur Alaska, Inc. and the State of Alaska.

The corporate disclosure statement included in Goldbelt's brief in support of petitioners remains accurate.

TABLE OF CONTENTS

BRIEF IN SUPPORT OF GOLDBELT'S REQUEST FOR AFFIRMATIVE RELIEF 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. IF THE COURT GRANTS THE RELIEF REQUESTED WITH RESPECT TO COEUR'S 404 PERMIT, SIMILAR RELIEF MUST BE GRANTED TO GOLDBELT WITH RESPECT TO ITS CASCADE POINT PERMIT 7

II. IMPORTANT CONSIDERATIONS OF PUBLIC POLICY AND JUSTICE ALSO SUPPORT GRANTING RELIEF TO GOLDBELT 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 7, 9

City of Angoon v. Marsh, 749 F.2d 1413 (9th Cir. 1984) 10

Koniag, Inc. v. Koncor Forest Res., 39 F.3d 991 (9th Cir. 1984) 10

Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 8

Statutes

ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2) 7

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT ("ANILCA"), Pub. L. 96-487, 94 Stat. 2371 (December 2, 1980) 4

ANILCA § 503(b), 94 Stat. 2399 3

ANILCA § 506(b), 94 Stat. 2409 ..... 4, 10

ALASKA NATIVE CLAIMS SETTLEMENT ACT, ("ANCSA"), 43 U.S.C. § 1613(h)(8) 2

CLEAN WATER ACT, 33 U.S.C. § 1344 1

CLEAN WATER ACT, § 404(b)(1), 33 U.S.C. § 404(b)(1) 5, 9

COASTAL ZONE MANAGEMENT ACT, 16 U.S.C. §§ 1451 *et seq.* 5, 9

ENDANGERED SPECIES ACT, 16 U.S.C. §§ 1531, et seq. 5

MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT, 16 U.S.C. §§ 1801, *et seq.* 5, 9

NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA"), 42 U.S.C. §§ 4321, *et seq.* 5, 9

PRESIDENTIAL PROCLAMATION 4611 (December 1, 1978) 3

Other

7 HANDBOOK OF NORTH AMERICAN INDIANS, NORTHWEST COAST (Smithsonian Inst. 1990) 2

44 Fed. Reg. 48379 (August 12, 1979) 3

H.Rep. No. 95-1045, Part I (April 7, 1978) 10

Rules

SUPREME COURT RULE 12(6) 1

BRIEF IN SUPPORT OF GOLDBELT'S REQUEST FOR AFFIRMATIVE RELIEF

Respondent Goldbelt, Inc. respectfully submits this brief in support of its request for affirmative relief in the event the Court reverses the judgment of the United States Court of Appeals for the Ninth Circuit as to petitioners Coeur Alaska, Inc. ("Coeur"), and the State of Alaska.[1] Goldbelt adopts the briefs on the merits filed by Coeur and the State of Alaska, as supplemented by the following matters specific to the relief requested by Goldbelt.

Goldbelt is the permittee under United States Army Corps of Engineers Permit POA-1997-245-N, issued pursuant to Section 404 of the CLEAN WATER ACT, 33 U.S.C. § 1344, to construct a marine terminal at Cascade Point, north of Juneau, Alaska, for the single purpose of providing mine worker shuttle services to Coeur's Kensington Gold Mine. Respondents the Sierra Club, Southeast Alaska Conservation Council ("SEACC"), and Lynn Canal Conservation challenged Goldbelt's permit in the same proceeding that is the subject of the Petitions filed by Coeur and the State of Alaska. The Ninth Circuit Court of Appeals vacated Goldbelt's permit for the sole reason that the permit's stated purpose supposedly failed as a result of the Court's ruling vacating Coeur's Section 404 permit for disposal of tailings from the Kensington Gold Mine into Lower Slate Lake. J.A. 519a n.2 & 549a–50a.

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[1] Goldbelt files this brief and request for affirmative relief pursuant to Supreme Court Rule 12(6).

Accordingly, if this Court grants the relief requested by either Coeur or the State of Alaska on the merits, it should also reverse the Ninth Circuit's decision vacating Goldbelt's Section 404 permit and supporting Record of Decision.

STATEMENT OF THE CASE

Goldbelt incorporates the Statements of the Case in the briefs filed by Coeur and the State of Alaska, and in addition represents the following:

1. Goldbelt is an Alaska Native urban corporation created pursuant to Section 14(h)(8) of the ALASKA NATIVE CLAIMS SETTLEMENT ACT ("ANCSA"), 43 U.S.C. § 1613(h)(8), to receive and administer lands and benefits from the United States in return for extinguishment of the aboriginal title of the Tlingit Indians residing in the vicinity of Juneau, Alaska. Goldbelt is wholly owned by Tlingit Indians, who are the current owners and descendants of the aboriginal occupants of the land on which the proposed and partially constructed Cascade Point marine terminal is located.

2. The Tlingit have lived in southeast Alaska from time immemorial. Berners Bay, where both the Kensington Gold Mine and Cascade Point are located, lies in the heart of Auke Tlingit aboriginal territory. J.A. 332a. *See also* 7 HANDBOOK OF NORTH AMERICAN INDIANS, NORTHWEST COAST, at 204 (Smithsonian Inst. 1990).

3. When Congress enacted the landmark ANCSA in 1971, it granted Goldbelt, on behalf of its more than 3,000 Tlingit Indian shareholders, the right to select 23,040 acres of land as partial compensation for the lands illegally taken by non-Native interlop-

ers and the United States Government in flagrant disregard of the Tlingit's aboriginal rights. J.A. 333a–34a.

4. When the Secretary of the Interior withdrew lands on Admiralty Island for Native selections pursuant to ANCSA, the Sierra Club and others sued to block Goldbelt's selections there.[2] Unlike several other Native Corporations that successfully maintained their right to develop their Admiralty Island lands, Goldbelt attempted to accommodate the environmental community by agreeing in 1979 to exchange its Admiralty Island selection rights for other lands thought to be less environmentally sensitive.[3] These lands included Cascade Point on the southern shore of Berners Bay. The exchange was ratified in Section 506(b) of the ALASKA NATIONAL INTEREST

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[2] Admiralty Island was originally designated it as a national monument in 1978 by President Jimmy Carter, in part to protect the archeological evidence of more than 10,000 years of continuous Tlingit occupancy. PRESIDENTIAL PROCLAMATION 4611 (December 1, 1978). Congress confirmed the creation of the monument in Section 503(b) of the ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT ("ANILCA"), Pub.L. 96-487, 94 Stat. 2399 (December 2, 1980).

[3] *See* 44 Fed. Reg. 48379 (August 12, 1979) (purpose of exchange to avoid continued litigation and further delays in land conveyances.) The exchange was intended to, and did, result in mooting the Sierra Club's challenge to Goldbelt's Admiralty Island selections. Although the Sierra Club was not a party to the exchange agreement, it was a direct and intended beneficiary. No objection by the Sierra Club, or anyone else, to substituting Cascade Point for Admiralty Island, appears in the Congressional record relating to the exchange.

LANDS CONSERVATION ACT ("ANILCA"), Pub. L. 96-487, 94 Stat. 2371, 2409 (December 2, 1980).

5. Cascade Point is on the Juneau road system and potentially very valuable. J.A. 334a. The City and Borough of Juneau has designated the lands around Cascade Point as a "new growth area." Goldbelt has expended a great deal of time and effort in responsible land use planning for the area. *Id.* Every single attempt by Goldbelt to put these lands to productive use, however, has been challenged and frustrated by the very same environmental organizations that sued to force Goldbelt off Admiralty Island. *Id.* 335a. Among other actions, the environmental organizations who appear as respondents in this proceeding (1) successfully opposed Goldbelt's efforts to permit a general purpose dock at Cascade Point in 1998, (2) opposed and appealed (unsuccessfully) Goldbelt's right to obtain surface access to its lands in 1999, and (3) successfully lobbied local, state and federal agencies to limit Goldbelt's use of a dock at Cascade Point to mine shuttle operations only. *Id.* As a result of the inequitable actions of the Sierra Club, SEACC and Lynn Canal Conservation, the intent of Congress has been frustrated, and Goldbelt's lands on Berners Bay have lain unproductive for the past quarter century.

6. When Coeur announced its intent to reopen the historic Kensington Gold Mine on the north shore of Berners Bay – which is accessible only by air or water – Goldbelt saw a perfect opportunity to develop its lands at Cascade Point on the south shore of the Bay as a marine terminal to provide mine worker shuttle services to the Mine.

7. Goldbelt's proposal was treated as a component of the overall Kensington Plan of Operations, and was subjected to years of exhaustive environmental studies by federal, state and local agencies. These studies included (1) an Environmental Impact Statement prepared pursuant to the NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, by the United States Forest Service, United States Army Corps of Engineers ("the Corps"), United States Environmental Protection Agency, and the State of Alaska, (2) a Biological Opinion prepared by the National Marine Fisheries Service pursuant to the ENDANGERED SPECIES ACT, 16 U.S.C. §§ 1531, et seq., (3) an Essential Fisheries Habitat study pursuant to the MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT, 16 U.S.C. §§ 1801, *et seq.*, (4) environmental and public interest reviews by the Corps pursuant to Section 404(b)(1) of the CLEAN WATER ACT, 33 U.S.C. § 1344(b)(1), and (5) Coastal Zone Consistency review by the State of Alaska pursuant to the COASTAL ZONE MANAGEMENT ACT, 16 U.S.C. §§ 1451 *et seq*. In each instance, Goldbelt's marine terminal proposal was found to satisfy all regulatory requirements for permit issuance. Not one of the favorable environmental findings reached in these numerous studies and reports has been challenged by the Sierra Club, SEACC, or Lynn Canal Conservation.

8. The Corps specifically concluded that Goldbelt's marine terminal proposal was the least environmentally damaging, practicable alternative for transporting workers to the Kensington Gold Mine site. J.A. 356a. When the Corps issued its Section 404 permit for a marine terminal limited to mine

shuttle operations, however, the Sierra Club, SEACC and Lynn Canal Conservation filed suit alleging that Goldbelt's permit was inextricably linked by purpose to Coeur's Section 404 permit for tailings disposal in Lower Slate Lake, and therefore could not survive a successful companion challenge to Coeur's permit.

SUMMARY OF ARGUMENT

1. The challenge to Goldbelt's permit, and the only reason given by the Ninth Circuit Court of Appeals for vacating that permit and its supporting Record of Decision, is the unsupported and arbitrary and capricious assumption that the Cascade Point marine terminal cannot fulfill its intended purpose of transporting workers to the Kensington Gold Mine site if Coeur is denied the right to dispose of mine tailings in Lower Slate Lake. If this Court reverses – as it should – the Ninth Circuit's decision vacating Coeur's permit for the tailings disposal, no basis for vacating Goldbelt's permit remains and the decision vacating Goldbelt's permit must be reversed as well.

2. Important considerations of public policy and justice also support granting relief to Goldbelt. Bullied out of their original land selections on Admiralty Island by the Sierra Club, all the Tlingit Indians have to show for a quarter century of expensive planning efforts and attempts to accommodate environmental objections is a partially completed, expensive and unusable breakwater. Granting the relief requested by Goldbelt will at long last enable the Tlingit Indians to realize the benefits Congress intended when it conveyed the Cascade Point lands to Goldbelt in lieu of its Admiralty Island selection rights.

ARGUMENT

I. IF THE COURT GRANTS THE RELIEF REQUESTED WITH RESPECT TO COEUR'S 404 PERMIT, SIMILAR RELIEF MUST BE GRANTED TO GOLDBELT WITH RESPECT TO ITS CASCADE POINT PERMIT

The Ninth Circuit's decision vacating Goldbelt's 404 permit and the agency's supporting Record of Decision ("ROD") is based on nothing more than its unsupported assumption that the purpose of providing shuttle service to the Kensington Gold Mine site cannot be accomplished if the Coeur 404 permit for tailings disposal in Lower Slate Lake is vacated. Thus, if this Court reverses the Ninth Circuit decision and restores Coeur's 404 permit and related authorizations for tailings disposal, no basis remains under the Ninth Circuit decision to vacate Goldbelt's permit, and as a matter of law the Ninth Circuit ruling regarding Goldbelt's permit must also be reversed. ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The Ninth Circuit decision vacating the Goldbelt 404 permit and supporting ROD is arbitrary and capricious: it presumes without foundation that the mine shuttle service purpose of the Goldbelt permit depends entirely on the Coeur 404 permit and cannot be accomplished if Coeur is required to modify its method of tailings disposal. *See* J.A. 519a n.2 & 549a–50a. This assumption is demonstrably incorrect. Goldbelt's permit is not tied to any particular method of tailings disposal. *See* C.A. E.R. 550-54 & 573. The Ninth Circuit had no basis in the record

before it to conclude that the Kensington Gold Mine, in which Coeur has invested hundreds of millions of dollars over the past decades, and which is poised to begin production pending only completion of a tailings disposal facility, would be abandoned if Coeur were required to find an alternative means of tailings disposal.[4] Any delay caused by the Ninth Circuit's decision with respect to the Lower Slate Lake method of tailings disposal might affect the timing of operations from Cascade Point, but did not provide a rationale for vacating the permit – let alone the ROD that took years of conscientious effort and expense to compile.[5]

The Corps of Engineers' action in granting a permit to Goldbelt for construction of a dock at Cas-

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[4] The Ninth Circuit's apparent assumption that its decision would result in abandonment of the Kensington Gold Mine and obviate the need for a marine terminal to transport mine workers is nonsensical. Although Coeur, the State of Alaska and the Corps agree that placement in Lower Slate Lake is the least environmentally harmful, practicable alternative for disposing of mine tailings, Coeur has been forced by the Ninth Circuit's erroneous ruling to file a contingent application for a permit employing a more expensive, less environmentally-friendly dry stack "paste" (surface) method of tailings disposal. That application was filed without prejudice to this appeal.

[5] The Ninth Circuit acknowledged that the "normal remedy" for unlawful agency action is to vacate the action and remand to the agency to act in compliance with its statutory obligations. J.A. 550. *Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Instead, the Ninth Circuit vacated not only Goldbelt's permit, but the ROD on which it was based – a ROD that the appellants had not challenged and the Court apparently did not even consider – thus sending Goldbelt back to square one.

cade Point cannot be vacated unless, after a "searching and careful" review of the ROD, the reviewing Court is left with the conclusion that there is no rational basis for issuance of the permit. *Citizens to Preserve Overton Park, Inc. v. Volpe*, supra, 401 U.S. at 416.

Here, the Sierra Club, SEACC, and Lynn Canal Conservation did not challenge the adequacy or the findings supporting any of the documents that examined exhaustively the environmental impacts of constructing and operating the Cascade Point marine terminal – the Environmental Impact Statement prepared pursuant to NEPA, the Essential Fish Habitat report prepared pursuant to the MAGNUSON-STEVENS ACT, the Biological Opinion prepared pursuant to the ENDANGERED SPECIES ACT, the State of Alaska's Certification pursuant to the CLEAN WATER ACT and its Consistency Determination pursuant to the COASTAL ZONE MANAGEMENT ACT, and the Corps of Engineers' Section 404(b)(1) Evaluation and Public Interest Review pursuant to the CLEAN WATER ACT. Nor does it appear that the Ninth Circuit even considered, let alone searchingly and carefully reviewed, this extensive record in reaching its decision with respect to Goldbelt.

II. IMPORTANT CONSIDERATIONS OF PUBLIC POLICY AND JUSTICE ALSO SUPPORT GRANTING RELIEF TO GOLDBELT

In addition to the reasons given by Coeur and the State of Alaska, this Court should reverse the decision of the Ninth Circuit Court of Appeals regarding Goldbelt's 404 permit because the decision deprives

Goldbelt and its Tlingit Indian shareholders of the economic benefits intended by Congress when it enacted ANCSA and conveyed the Cascade Point lands to Goldbelt. That decision has dealt a devastating blow to economically disadvantaged Tlingit Indians throughout northern southeast Alaska.

Congress intended that Goldbelt would be able to use Cascade Point for economic development and betterment of Goldbelt's shareholders.[6] *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 996–97 (9th Cir. 1984) (Congress expected and intended that Alaska Native Corporations would select their Settlement Act lands for economic development purposes); *City of Angoon v. Marsh*, 749 F.2d 1413, 1488 (9th Cir. 1984) (permitting Native Corporation to log ANCSA lands within Admiralty Island National Monument) ("it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands conveyed").

Congress emphasized its intent to facilitate Goldbelt's acquisition and use of its Berners Bay lands by exempting the off-Admiralty exchange from review under NEPA. ANILCA Section 506(b), 94 Stat. 2409. Yet, more than a quarter century later, the never-ending administrative and court challenges filed by the Sierra Club, SEACC and the Lynn Canal Conservation Society have deprived Goldbelt

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[6] Congress was well aware that Goldbelt was willing to exchange its selections on Admiralty Island only if its economic interests would be furthered. H.Rep. No. 95-1045, Part I (April 7, 1978).

of virtually any productive use of its lands at Cascade Point.

It would be difficult to overstate the importance of the Kensington Gold Mine and Cascade Point marine terminal to the Tlingit Indians of the Juneau area – Goldbelt's shareholders. The Ninth Circuit's decision to vacate the Coeur and Goldbelt permits has done far more than unfairly dash Goldbelt's most recent attempt to use its Settlement lands. It has struck a crippling blow to the economic aspirations of a generation of Tlingit Indians living in northern southeast Alaska.

Southeast Alaska has been hard hit by the decline of the timber and fishing industries. J.A. 505a. In the Juneau area, the economic downturn has been compounded by a contraction of employment opportunities in the public sector. *See* C.A. Br. of the City and Borough of Juneau, as *Amicus Curiae* in Support of Defendants-Appellees 12. Economists estimate that the lack of decent paying jobs is resulting in a net out-migration of as much as 4500 persons a year from Southeast Alaska, especially in the 25- to 35-year-old range. *See* C.A. *Amicus Curiae* Br. of Southeast Conf. in Support of Defendants-Appellees 6 (the Southeast Conference represents the interests of thirty Southeast Alaska member communities, nine Alaska Native corporations, and numerous other private and public entities in the region).

The economic hard times have crippled the rural, largely Native, areas of Southeast Alaska where employment opportunities are virtually non-existent. *See* C.A. Br. of *Amicus Curiae* Berners Bay Consortium in Support of Appellees 4 (the Consortium is a

coalition of Native Corporations and Coeur Alaska, Inc.). Although many of Goldbelt's shareholders reside in the Juneau area, their unemployment rates are two to three times higher than the rates for non-Natives. Much of the employment that is available to them is seasonal, low paying and without benefits. J.A. 506a.

From the outset, Coeur has recognized that the Kensington Gold Mine lies at the heart of Tlingit traditional territory and has taken truly extraordinary measures to insure that Native Alaskans are included in the prosperity that the mine promises. These efforts not only have been exemplary, they are unprecedented. As one Tlingit leader put it:

> No other company . . . has ever worked so conscientiously as Coeur to involve the Natives of Northern Southeast Alaska in the planning of its activities, or been so diligent in its efforts to ensure that Alaska Natives are included in the economic benefits to be derived from its operations.

J.A. 505a.

Before the Ninth Circuit effectively shut down the Kensington Gold Mine, Coeur had been training Alaska Natives for high-paying, full-time jobs in the mining industry. Roughly 25 percent of the construction workforce at the Kensington Gold Mine was Alaska Native. Coeur had promised partnerships with Native Corporations, including Goldbelt, to provide goods and services – such as the mine shuttle service Goldbelt plans to operate from its Cascade Point terminal. J.A. 503a–05a.

The optimism generated by Coeur's Native-friendly operations has been dashed by the Ninth Circuit's rulings. This Court should reverse – not only to correct an erroneous reading of the Clean Water Act – but to fulfill the quarter-century-old promise of Congress that the lands it intended for the economic benefit of the Tlingit Indians not be locked up in perpetuity by endless, inequitable litigation by the Sierra Club, SEACC and Lynn Canal Conservation aimed at relegating those lands to de facto wilderness status.

CONCLUSION

For these reasons, and for the reasons set out in the briefs on the merits of Coeur and the State of Alaska, the decision of the Ninth Circuit Court of Appeals should be reversed as to the federal defendants, Coeur and also Goldbelt.

Respectfully submitted.

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September 17, 2008

RESPONDENT'S BRIEF

SEP 17 2008
OFFICE OF THE CLERK

Nos. 07-984 and 07-990

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Army Corps of Engineers' authority to issue a permit for the discharge of dredged or fill material, pursuant to the statutory scheme that specifically addresses such material, is displaced by the Environmental Protection Agency's promulgation of an effluent limitation or new-source performance standard pursuant to other provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, that address the discharge of pollutants generally.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory and regulatory provisions involved 2
Statement 2
Summary of argument 13
Argument:
The proposed discharges at issue in this case are governed by Section 404 rather than Section 402 of the Clean Water Act. 16
A. A discharge of fill material is subject to Section 404's permitting scheme, notwithstanding EPA's promulgation of an otherwise applicable effluent limitation. 17
1. The text, structure, and purpose of the Act dictate that a discharge of fill material be regulated under Section 404, not under Section 402 18
2. The Ninth Circuit's interpretation cannot be reconciled with the unambiguous terms of the Act 23
3. The Corps' and EPA's longstanding interpretations of the Act's regulatory scheme resolve any ambiguity 26
B. The Corps and EPA properly concluded that the proposed discharge of mine tailings constitutes a "discharge of fill material." 29
1. The agencies' considered adoption of an effects-based definition of "fill material" provides an administrable line between Section 402 and Section 404 discharges 29

Table of Contents—Continued: Page

2. The agencies' conclusion that the proposed discharge constitutes a "discharge of fill material" under the fill rule is controlling 33
Conclusion 41
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 16, 34
Bowles v. *Seminole Rock Co.*, 325 U.S. 410 (1945) 34
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 26, 28, 29, 30
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 34
Clifford F. MacEvoy v. *United States for the Use & Benefit of Calvin Tomkins Co.*, 322 U.S. 102 (1944) 19
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 25, 26
IBP, Inc. v. *Alvarez*, 546 U.S. 21 (2005) 34
National Assoc. of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 38
National Cable & Telecomms. Ass'n v. *Gulf Power Co.*, 534 U.S. 327 (2002) 19
National Wildlife Fed'n v. *EPA*, 286 F.3d 554 (D.C. Cir. 2002) 34
Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) 35
Rapanos v. *United States*, 547 U.S. 715 (2006) 19, 26

Cases—Continued: Page

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 34
Russello v. *United States*, 464 U.S. 16 (1983) 21

Statutes and regulations:

Clean Water Act, 33 U.S.C. 1251 *et seq.* 2
§ 101(a), 33 U.S.C. 1251(a) 2
§ 301, 33 U.S.C. 1311 ..... *passim*
§ 301(a), 33 U.S.C. 1311(a) 2, 15, 23, 24, 25
§ 301(e), 33 U.S.C. 1311(e) 15, 23, 25
§ 302, 33 U.S.C. 1312 ..... 22, 24
§ 302(k), 33 U.S.C. 1312(k) 22
§ 304, 33 U.S.C. 1314 37
§ 306, 33 U.S.C. 1316 ..... *passim*
§ 306(a), 33 U.S.C. 1316(a) 5
§ 306(a)(1), 33 U.S.C. 1316(a)(1) 5
§ 306(b), 33 U.S.C. 1316(b) 5
§ 306(e), 33 U.S.C. 1316(e) 5, 15, 23, 25
§ 307, 33 U.S.C. 1317 ..... *passim*
§ 307(a)(5), 33 U.S.C. 1317(a)(5) 21
§ 318, 33 U.S.C. 1328 ..... 18, 19, 24
§ 318(a), 33 U.S.C. 1328(a) 18
§ 318(b), 33 U.S.C. 1328(b) 18
§ 402, 33 U.S.C. 1342 ..... *passim*
§ 402(a), 33 U.S.C. 1342(a) 5, 18
§ 402(a)(1), 33 U.S.C. 1342(a)(1) 20, 25
§ 402(a)(1)(A), 33 U.S.C. 1342(a)(1)(A) 5
§ 402(k), 33 U.S.C. 1342(k) 22

Statutes and regulations—Continued: Page

§ 403, 33 U.S.C. 1343 22
§ 404, 33 U.S.C. 1344 ..... *passim*
§ 404(a), 33 U.S.C. 1344(a) 3, 18
§ 404(a)(1), 33 U.S.C. 1344(a)(1) 20
§ 404(b), 33 U.S.C. 1344(b) 20
§ 404(b)(1), 33 U.S.C. 1344(b)(1) ..... *passim*
§ 404(c), 33 U.S.C. 1344(c) 4, 9, 23
§ 404(p), 33 U.S.C. 1344(p) 5, 22
§ 502(7), 33 U.S.C. 1362(7) 2
§ 502(11), 33 U.S.C. 1362(11) 5
§ 502(12), 33 U.S.C. 1362(12) 2
§ 505, 33 U.S.C. 1365 22
Clean Water Act of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599 19
Federal Water Pollution Control Act, Pub. L. No. 92-500, § 318, 86 Stat. 877 18
16 U.S.C. 478 7
16 U.S.C. 482 7
33 C.F.R.:
Section 320.4(a)(1) 4
Section 323.2 16
Section 323.2(e) 13
Section 323.2(e)(1) 3, 29, 33
Section 323.2(f) 3, 13, 29, 33
36 C.F.R. 228.4(a) 7

Regulations—Continued: Page

40 C.F.R.:
Pt. 122:
Section 122.2 6
Section 122.3(b) 27
Pt. 125:
Section 125.4(d) (1973) 27
Pt. 230 3
Section 230.1(c) 4
Section 230.10(a) 4, 20
Section 230.10(b) 4
Section 230.10(b)(1) 21
Section 230.10(b)(2) 21, 27
Section 230.10(c) 4, 21
Section 230.10(d) 4, 21
Section 230.11(d) 21
Section 230.11(e) 21
Section 230.60 21
Section 230.61 21
Pt. 232:
Section 232.2 ..... 3, 13, 15, 29, 32, 33
Pt. 440:
Section 440.104 ..... 5, 38
Section 440.104(b)(1) 6

Miscellaneous:

118 Cong. Rec. 10,632 (1972) 22

Miscellaneous—Continued: Page

40 Fed. Reg. (1975):
p. 31,325 30
p. 41,298 30
42 Fed. Reg. (1977):
p. 37,122 30
p. 37,145 30
45 Fed. Reg. 33,421 (1980) 30
47 Fed. Reg. 25,682 (1982) 39
51 Fed. Reg. (1986):
p. 8871 ..... 27, 31
p. 8872 31
65 Fed. Reg. (2000):
p. 21,292 ..... 30, 31
p. 21,293 ..... 19, 20
p. 21,294 31
pp. 21,294-21,295 31
67 Fed. Reg. (2002):
p. 31,129 3
pp. 31,129-31,130 32
p. 31,130 ..... 12, 36
p. 31,132 32
pp. 31,132-31,133 31
p. 31,133 32
p. 31,134 31
p. 31,135 ..... 12, 27, 35, 36, 37, 39

Miscellaneous—Continued: Page

Letter from Alaska Dept. of Envtl. Conservation (June 17, 2005) <www.dnr.state.ak/mlw/mining/largemine/kensington/pdf/AK0050571cert.pdf> ... 11

S. 2770, 92d Cong., 1st Sess. (1971) 22

S. Rep. No. 1236, 92d Cong., 2d Sess. (1972) 23

In the Supreme Court of the United States

No. 07-984

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

No. 07-990

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 486 F.3d 638.[1] The opinion of the district court (Pet. App. 38a-56a) is unreported.

[1] All references to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 07-984.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2007. A petition for rehearing was denied on October 29, 2007 (Pet. App. 36a-37a). The petitions for a writ of certiorari in No. 07-984 and No. 07-990 were filed on January 28, 2008, and January 25, 2008, respectively. The petitions for a writ of certiorari were granted on June 27, 2008, and the cases were consolidated. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

1. The Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, CWA Section 301(a) prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to the waters of the United States from any point source—except "as in compliance with" specified provisions of the Act. 33 U.S.C. 1311(a), 1362(7), 1362(12). In most cases, regulated entities achieve compliance with the relevant CWA provisions by obeying the terms of a permit issued under one of the Act's two complementary permitting programs: (1) a permit program for discharges of dredged or fill material, which is administered primarily by the Army Corps of Engineers (Corps) pursuant to Section 404 of the Act, 33 U.S.C. 1344; or (2) the National Pollutant

Discharge Elimination System (NPDES), which is administered by the Environmental Protection Agency (EPA) and approved States pursuant to Section 402 of the Act, 33 U.S.C. 1342.

a. CWA Section 404(a) authorizes the Corps to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). The Act does not define the term "fill material." On May 9, 2002, the Corps and EPA jointly published a rule to "clarify the Section 404 regulatory framework" and to adopt a uniform definition of "fill material." 67 Fed. Reg. 31,129.

The agencies' rule defines "fill material" to mean

> material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.

33 C.F.R. 323.2(e)(1) (Corps regulation); 40 C.F.R. 232.2 (EPA regulation). The fill rule specifically defines "discharge of fill material" to include the "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. 323.2(f); 40 C.F.R. 232.2.

The Section 404 permitting program is governed by regulations (known as the Section 404(b)(1) Guidelines) that Congress directed EPA to promulgate in consultation with the Corps under CWA Section 404(b)(1), 33 U.S.C. 1344(b)(1). The Section 404(b)(1) Guidelines (codified at 40 C.F.R. Pt. 230) establish numerous conditions to ensure that a Section 404 permit will be granted only where a discharge of dredged or fill material will not have "an unacceptable adverse impact" on the envi-

ronment. 40 C.F.R. 230.1(c). The Guidelines require the Corps to deny a permit if "there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a).

Under the Section 404(b)(1) Guidelines, a proposed discharge will not be permitted if it would violate any applicable State water quality standard or toxic effluent standard under CWA Section 307, or if it would jeopardize species listed as endangered or threatened under the Endangered Species Act. 40 C.F.R. 230.10(b). A Section 404 permit also must be denied where a discharge of dredged or fill material "will cause or contribute to significant degradation of the waters of the United States," such as by causing "[s]ignificantly adverse effects" on human health or welfare, aquatic and other wildlife, the aquatic ecosystem, or recreational, aesthetic, and economic values. 40 C.F.R. 230.10(c). No discharge will be permitted unless "appropriate and practicable steps have been taken which will minimize potential adverse impacts." 40 C.F.R. 230.10(d). Finally, under the Corps' public-interest review regulations, no permit can issue if the district engineer determines that the discharge would be "contrary to the public interest." 33 C.F.R. 320.4(a)(1).

EPA can veto (in whole or in part) a Section 404 permit if it determines that the discharge will have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. 1344(c). Once a Section 404 permit is granted, compliance with that permit shall be deemed compli-

ance with, *inter alia*, Section 301 of the Act. 33 U.S.C. 1344(p).

b. CWA Section 402(a) states that, "[e]xcept as provided" in Section 404, EPA may issue NPDES permits for the discharge of any pollutant into navigable waters "upon condition that such discharge will meet" the requirements of other enumerated provisions of the Act, including Section 306, 33 U.S.C. 1316. 33 U.S.C. 1342(a)(1)(A). Section 306 directs EPA to publish regulations establishing technology-based standards of performance, a type of effluent limitation, for effluent reduction from categories of new sources. 33 U.S.C. 1316(a) and (b).[2] Those new-source performance standards must reflect "the greatest degree of effluent reduction" achievable "through application of the best available demonstrated control technology, processes, operating methods, or other alternatives" and may require that pollutant discharges be avoided altogether. 33 U.S.C. 1316(a)(1). Section 306(e) states that "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. 1316(e).

In 1982, pursuant to Section 306, EPA issued a new-source performance standard for gold mine operations that use a froth-flotation milling process. 40 C.F.R. 440.104. The froth-flotation process involves placement of finely ground ore into tanks, where water and chemical frothing agents are added. J.A. 189a-191a. Those agents cause gold-bearing minerals to attach to air bub-

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[2] An "effluent limitation" is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. 1362(11).

bles that rise to the surface of the mixture when air is pumped into the system, allowing the gold-bearing froth to be skimmed off the top. J.A. 191a. Tailings are the solid material (*i.e.*, residual ground rock) left in the bottom of the flotation tanks after the gold-bearing minerals have been removed. J.A. 192a. The new-source performance standard provides, except in circumstances not applicable here, that "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process * * * for the beneficiation of * * * gold." 40 C.F.R. 440.104(b)(1). "Process wastewater" is defined as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product." 40 C.F.R. 122.2.

2. The instant case involves a challenge to the Corps' issuance of a Section 404 permit for proposed discharges of a tailings-wastewater slurry (solids-liquid mixture) that would change the bottom elevation of a lake. The Corps issued a Section 404 permit to petitioner Coeur Alaska, Inc. (Coeur) for the discharge of a tailings slurry from a froth-flotation mill into an impoundment in Lower Slate Lake, in conjunction with the proposed operation of the Kensington gold mine in southeast Alaska, about 45 miles north of Juneau. The tailings, once deposited, would raise the bottom elevation of the lake by 50 feet. Pet. App. 3a. The grant of the permit followed nearly two decades of analysis, completion of three environmental impact statements, and major revisions to the project that reduced its scope and environmental impacts. J.A. 340a-377a.

In July 1992, after issuing a final environmental impact statement (EIS), the United States Forest Service

(with the Corps as a cooperating agency) approved a plan of operations for a proposal differing in substantial respects from the current project.[3] That plan provided for on-site cyanide processing of gold concentrate derived from a froth-flotation mill, wet tailings impoundment in Sherman Creek, marine discharge of effluent, and an on-site camp for housing workers. Coeur applied for a Section 404 permit for creation of the tailings impoundment facility, but the Corps never issued a permit. See J.A. 351a-352a; C.A. ER 77.

In May 1998, after publishing a supplemental EIS, the Forest Service (with the Corps again as a cooperating agency) approved a revised plan of operations. That plan called for off-site cyanide processing of the froth-flotation concentrate and the creation of a "dry" tailings impoundment facility in nearby wetlands. The tailings slurry would be piped to a dewatering plant before deposition of the tailings into the impoundment. The mine would produce a total of 26 million tons of tailings, with 25% of that to be backfilled into the mine. In January 1998, the Corps issued a Section 404 permit to Coeur to construct the dry tailings facility and supporting infrastructure. See J.A. 352a.

In November 2001, after Coeur gained control of the Jualin Mine site (thereby altering the land status and gold-resource calculations), it submitted a revised proposal. J.A. 352a-353a. The stated purpose of the revised plan was to improve efficiency and reduce the extent of surface disturbance. J.A. 210a. *Inter alia*, the revised proposal eliminated the dry tailings facility, which would

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[3] Because the Kensington mine is located in part on National Forest System lands, J.A. 208a, Coeur must obtain approval for its plan of operations from the Forest Service. 16 U.S.C. 478, 482; 36 C.F.R. 228.4(a).

have been located in wetlands, in favor of placing the tailings into an impoundment in Lower Slate Lake. The project would produce a greatly reduced volume of tailings, totaling 7.5 million tons, 40% of which would be backfilled into the mine. As with the prior proposal, the ore would go through on-site froth-flotation processing with the resulting concentrate shipped offsite for cyanide processing; but the froth-flotation mill would be relocated near the Jualin Mine site. The on-site housing camp was also eliminated in favor of a daily commute for mine workers. J.A. 353a.

In December 2004, the Forest Service, with the Corps, EPA, and State of Alaska as cooperating agencies, issued a final supplemental EIS (FSEIS) addressing two different sets of alternatives. See J.A. 159a. The first set (Alternatives A and A1), based on the 1998 proposal, involved use of a dry tailings facility situated in wetlands. The second set (Alternatives B, C, and D), based on the revised proposal, involved the discharge of a tailings slurry into the wet tailings impoundment at Lower Slate Lake and the construction of marine terminals at Slate Creek Cove and Cascade Point for the export of ore concentrate and daily transport of personnel. See J.A. 172a-184a.

On December 9, 2004, the Forest Service approved the plan, selecting Alternative D as its preferred alternative. J.A. 207a-248a. The Forest Service concluded —based on the FSEIS, input from all the cooperating agencies, and various mitigation measures—that Alternative D would provide "the best combination of components to minimize ground disturbance, reduce impacts to wetlands, provide safe and efficient transportation of workers, and reduce on-site fuel storage." J.A. 218a. In particular, the Forest Service found that Alternative D

"reduce[s] wetland disturbance by 171 acres compared to the previously approved plan," and that, unlike for Alternative A, "virtually all of the wetlands affected by Alternative D will be reclaimed following closure." J.A. 219a. The Forest Service also found that, unlike for Alternative A, reclamation of the tailings storage facility in Lower Slate Lake "will recreate habitat lost during operations and restore a viable fish population comparable to pre-operational conditions." *Ibid.* The State of Alaska also identified Alternative D as its preferred alternative. J.A. 216a-217a. EPA identified Alternative A as the environmentally preferable alternative, J.A. 300a, but did not exercise its Section 404(c) veto power.

On June 17, 2005, the Corps issued a Section 404 permit to Coeur for the discharge of fill material in the form of a tailings slurry into the Lower Slate Lake impoundment. J.A. 266a-272a. On July 15, 2005, the Corps issued a Section 404 permit to petitioner Goldbelt, Inc. (Goldbelt) for discharges from the construction of a marine terminal at Cascade Point. On March 29, 2006, after a temporary suspension and pending reevaluation, the Corps reinstated the permits and issued a Revised Record of Decision (ROD), explaining the basis of its permit grants. J.A. 340a-377a. The Corps determined that both permits complied with the Section 404(b)(1) Guidelines and with the Corps' public-interest review regulations. J.A. 340a-344a. Based on a detailed analysis of the alternatives, including comments from EPA and others, the Corps concluded that Alternative D "has the least environmental impact," "is the environmentally preferable alternative," and is the "least environmentally damaging practicable alternative" for the project. J.A. 354a.

Coeur's Section 404 permit authorizes the discharge into the Lower Slate Lake impoundment of a maximum of 4.5 million tons of tailings over the 10-15 year life of the project, or up to 1440 tons per day. Pet. App. 6a. The tailings would be transported from the froth-flotation mill to the impoundment in a slurry (55% solids by weight) through a 3.5-mile pipeline. *Ibid.*; J.A. 194a. Before the tailings slurry leaves the mill, a polymer and flocculant would be added to agglomerate the smaller tailings and enhance settling once the slurry is deposited into Lower Slate Lake. *Ibid.* Those additives are non-toxic and would have no effect on water quality. *Ibid.* The tailings slurry would be discharged through perforations in the bottom of the submerged pipe and deposited deep enough to prevent remobilization. *Ibid.*; J.A. 361a.

The permit requires reclamation of the lake after the completion of mining operations. J.A. 360a-363a. It is anticipated that most aquatic life in Lower Slate Lake would be lost during mining operations, primarily from being covered with the discharged tailings rather than from chemical toxicity. J.A. 361a. According to the Corps, the level of metal contaminants would pose a low risk, and although the pH around the discharge pipe would be toxic to the aquatic environment, that toxicity "will dissipate very rapidly." J.A. 360a. The Corps also found that the required capping of the tailings would assist in reestablishing the lake bottom habitat. J.A. 361a. By the project's closure, the lake's surface will have risen significantly, and the lake will have grown from its current size of 23 acres to approximately 62 acres in area (consisting of 47 acres of deepwater habitat and 15 acres of aquatic shallow-water habitat). J.A. 362a. The Corps therefore expects that the lake

"will recover over time" and eventually "will provide at least equivalent productivity as the current conditions of Lower Slate Lake." J.A. 361a.

EPA also issued to Coeur a NPDES permit under Section 402 for discharges from the Lower Slate Lake impoundment into downstream waters. J.A. 287a-331a. Coeur would construct a reverse osmosis treatment system to treat the effluent prior to its discharge, ensuring compliance with total suspended solids and metals limitations. J.A. 303a-305a. The State of Alaska also has certified that those discharges would meet all applicable Alaska water quality standards. J.A. 256a-265a, 485a n.31; Letter from Alaska Dept. of Envtl. Conservation (June 17, 2005) <www.dnr.state.ak.us/mlw/mining/largemine/kensington/pdf/AK0050571Cert.pdf>.

3. a. In September 2005, respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation sued the Corps in the District Court for the District of Alaska, seeking a judicial order that would invalidate the Section 404 permits. Respondents contended that the discharge of tailings under the Coeur permit would violate Sections 301 and 306 of the Act, given the existence of an EPA new-source performance standard limiting the discharge of process wastewater from a froth-flotation mill. The State of Alaska, Coeur, and Goldbelt intervened as defendants. Pet. App. 7a-8a.

b. On August 4, 2006, the district court granted summary judgment to the Corps and dismissed the complaint. Pet. App. 39a-56a. The district court held that the Section 404 permitting process is an "exception" to the NPDES permit process under Section 402, and that the issuance of Section 404 permits for the discharge of fill material is governed by the Section 404(b)(1) Guide-

lines rather than by Sections 301 and 306. *Id.* at 51a. The court further determined that the Corps' and EPA's jointly promulgated fill rule was valid, and that the proposed discharge of a tailings slurry into the Lower Slate Lake impoundment qualifies as a "discharge of fill material" under the plain terms of that rule because it would "change the bottom elevation" of the lake. *Id.* at 53a. In rejecting respondents' contention (based on excerpts from the regulatory preamble) that the agencies had not intended to include mine tailings in the definition of fill material, the court explained that other portions of the preamble (specifically addressing tailings) contradicted that contention. *Id.* at 53a-55a (citing 67 Fed. Reg. at 31,130, 31,135). Because respondents did not dispute that Coeur's permit satisfied the Section 404(b)(1) Guidelines, *id.* at 51a n.44, and did not make any independent argument against the validity of Goldbelt's permit, *id.* at 56a, the district court upheld both permits, *ibid.*

c. The court of appeals reversed. Pet. App. 1a-35a.

The court of appeals held that, "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." Pet. App. 17a. In the court's view, CWA Sections 301 and 306 unambiguously prohibit all pollutant discharges, including discharges of dredged or fill material, that are contrary to the effluent limitations and performance standards promulgated under the Act. *Id.* at 15a-17a. The court relied principally on those provisions' use of the terms "any" and "all." *Id.* at 15a. The court concluded on that basis that EPA's promulgation of a performance standard displaces the Corps' Sec-

tion 404 permitting regime in favor of EPA's Section 402 permitting program. *Id.* at 17a-18a.

The court of appeals stated that the regulatory history "further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of 'fill material' to replace the performance standard for froth-flotation mills." Pet. App. 19a. The court acknowledged that, in the 2002 fill rule, EPA and the Corps had jointly adopted an effects-based definition of "fill material" and had defined "discharge of fill material" to include "placement of overburden, slurry, or tailings or similar mining-related materials." *Id.* at 29a (quoting 33 C.F.R. 323.2(e) and (f); 40 C.F.R. 232.2). The court interpreted other language in the preamble to the fill rule, however, as indicating a contrary intent, and it concluded that "the performance standard governs because it is more specific." *Id.* at 26a-27a, 32a.

The court of appeals concluded that Coeur's permit "violates § 301 and § 306 of the Clean Water Act." Pet. App. 34a. It remanded to the district court to vacate that permit, as well as Goldbelt's Section 404 permit (on the ground that it depended on the validity of Coeur's permit) and the Forest Service's ROD (approving the plan of operations). *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a discharge of mine tailings that constitutes a "discharge of fill material" under the plain terms of the agencies' joint definition must be regulated by EPA under Section 402 of the CWA, rather than by the Corps under Section 404 of the CWA. The text, structure, and purpose of both the Act and the 2002 fill rule—as well as the Corps' and EPA's considered construction of the Act and their own

regulation—make clear that discharges of "fill material" are subject only to the Section 404 permitting process. The relevant provisions of law also make clear that the Corps, in determining whether to grant a Section 404 permit application for such a discharge, is not required to apply new-source performance standards adopted by EPA pursuant to Section 306. The Ninth Circuit fundamentally erred in rejecting the agencies' controlling interpretations of the pertinent statutory and regulatory provisions, and in setting aside the Section 404 permits at issue in this case.

A. The text of the pertinent provisions of the CWA unambiguously answer the question presented. CWA Sections 402 and 404 establish a dual-permitting structure, reflecting Congress's determination that discharges of fill material raise concerns distinct from those posed by other pollutant discharges. Section 404 authorizes the Corps to issue permits specifically "for the discharge of dredged or fill material" when certain conditions are satisfied. Section 402 addresses the permitting of discharges *other than* "dredged or fill material" by authorizing EPA to issue permits "[e]xcept as provided in sections [318 and 404]."

While Section 402 emphasizes protection of water-quality concerns by requiring compliance with various effluent limitations, Section 404 takes a broader approach based on the practicability of other alternatives and minimization of overall environmental impacts (including wetlands preservation). The Act and the Section 404(b)(1) Guidelines require that discharges of fill material comply with toxic effluent limitations promulgated under Section 307, but they do *not* require compliance with other effluent limitations.

The Ninth Circuit's decision subverts the Act's careful division of authority between the Corps and EPA and its establishment of distinct criteria for permitting decisions under Sections 402 and 404. The court's reliance on the words "and" and "any" in Sections 301(a), 301(e), and 306(e) was misplaced and overlooks the simple yet crucial point that the provisions require compliance only with *applicable* effluent limitations and performance standards. By the Act's own terms, those limitations and standards do not apply to discharges of fill material.

To the extent that any ambiguity remains, the Corps and EPA have reasonably resolved that ambiguity. Since the Act's initial passage, those agencies consistently have determined that discharges of fill material should be regulated by the Corps under Section 404 and are not subject to EPA effluent limitations (except those promulgated under Section 307). That understanding is reflected in the Section 404(b)(1) Guidelines, in the regulatory definition of "fill material," and in the agencies' final permitting decisions in this case. The Ninth Circuit erred in substituting its own contrary construction for the interpretation reached by the agencies charged with administering the Act.

B. The proposed discharge of tailings at issue in this case constitutes a "discharge of fill material" subject to regulation under Section 404. The 2002 rule jointly promulgated by the Corps and EPA demarcates the line between discharges of fill material regulated under Section 404 and other discharges regulated under Section 402. That carefully drawn line, premised on the effect of the discharge rather than on its purpose, is based on the agencies' expertise and experience.

Under the plain terms of the rule, the tailings slurry at issue here unquestionably constitutes "fill material"

because placement of tailings into the impoundment at Lower Slate Lake would have "the effect of * * * [c]hanging the bottom elevation of any portion of a water of the United States" by 50 feet. 33 C.F.R. 323.2; 40 C.F.R. 232.2. Moreover, the rule specifically provides that a "discharge of fill material" includes the "placement of overburden, slurry, or tailings or similar mining-related materials." *Ibid.* Where (as here) the text provides a clear answer, it is dispositive.

The Ninth Circuit's selective reliance on statements from the preamble to the fill rule and on other regulatory history cannot trump the rule's unambiguous language or the agencies' controlling construction of that text. See *Auer* v. *Robbins*, 519 U.S. 452, 460-461 (1997). In any event, those general statements are contradicted by more specific statements in the preamble clarifying that Section 404 governs mine tailings. EPA's 1982 new-source performance standard, which EPA itself interpreted in light of the 2002 fill rule as inapplicable to the tailings discharge at issue, likewise does not compel a different conclusion.

ARGUMENT

THE PROPOSED DISCHARGES AT ISSUE IN THIS CASE ARE GOVERNED BY SECTION 404 RATHER THAN SECTION 402 OF THE CLEAN WATER ACT

At issue in this case is whether a discharge of fill material should be regulated under Section 404, the provision of the Clean Water Act specifically designed to govern such discharges, or rather under Section 402, simply because EPA has promulgated an otherwise applicable effluent limitation. The text, structure, and purpose of the Act—in particular, its creation of a dual-permitting regime—make clear that Congress intended to subject

the discharge of fill material to the requirements of Section 404 (which are tailored to the unique concerns of such discharges) and not to the separate requirements (including new-source performance standards) applicable to other pollutant discharges under Section 402. To the extent that any ambiguity exists, the Corps and EPA have consistently interpreted the Act as authorizing the Corps to issue Section 404 permits for the discharge of fill material even where an effluent limitation would otherwise apply. The Ninth Circuit erred in disregarding the text of the Act and that permissible administrative interpretation.

Under the controlling regulatory definitions, the tailings at issue in this case constitute "fill material," and the proposed discharge constitutes a "discharge of fill material." Respondents do not challenge the validity of the Corps' and EPA's jointly promulgated definitions of the relevant statutory language, nor do they dispute that the discharge of tailings proposed here falls squarely within the plain terms of those definitions. The Ninth Circuit erred in rejecting the agencies' controlling interpretation of their own regulation. The court's holding unjustifiably undermines the Act's explicit charge to the Corps and EPA to treat the discharge of fill material differently from other discharges, and distorts the dividing line carefully drawn by those agencies after their considered collaboration.

A. A Discharge Of Fill Material Is Subject To Section 404's Permitting Scheme, Notwithstanding EPA's Promulgation Of An Otherwise Applicable Effluent Limitation

As set out above (pp. 2-3, *supra*), the Clean Water Act prohibits the discharge of any pollutant into the waters of the United States, except (with discrete excep-

tions not applicable here) pursuant to a permit. 33 U.S.C. 1311. Permits may be issued pursuant to either Section 404 or Section 402. The basic question in this case is which permitting provision applies to a "discharge of fill material" within the meaning of Section 404, when the substance being discharged would otherwise be covered by an EPA effluent limitation. The text, structure, and purpose of the Act compel the conclusion—reached by the agencies charged with administering the Act—that such discharges are subject to the Section 404 permitting process.

1. The text, structure, and purpose of the Act dictate that a discharge of fill material be regulated under Section 404, not under Section 402

Section 404 of the CWA authorizes the Corps to issue permits specifically "for the discharge of dredged or fill material" into waters of the United States when certain conditions are satisfied. 33 U.S.C. 1344(a). In contrast, Section 402 governs *other* discharges into waters of the United States by stating that, "*[e]xcept as provided in sections [318 and 404]*, the Administrator may * * * issue a permit for the discharge of any pollutant, or combination of pollutants," when certain other requirements are met. 33 U.S.C. 1342(a) (emphasis added).[4] By the

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[4] Section 318 allows EPA to issue permits for discharges associated with certain aquaculture projects. 33 U.S.C. 1328. As originally enacted, Section 318 provided only that the EPA Administrator was to "establish * * * procedures and guidelines he deems necessary to carry out this section." Federal Water Pollution Control Act, Pub. L. No. 92-500, § 318, 86 Stat. 877. In 1977, Congress amended that section to authorize EPA to permit aquaculture discharges "pursuant to [Section 402]" and to establish regulations "requir[ing] the application to such discharge[s] of each criterion, factor, procedure, and requirement applicable to a permit issued under section [402]." 33 U.S.C. 1328(a)

use of that "except" clause, Congress mandated that the specific Section 404 permitting regime, rather than the more general Section 402 NPDES permitting regime, be used in regulating discharges of dredged or fill material. For the regulation of discharges of dredged or fill material, Section 404 thus serves as an explicit exception to Section 402's otherwise unqualified reach. It is well established that a specific provision of a statute prevails over a more general section of the same statute. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002); *Clifford F. MacEvoy* v. *United States for the Use & Benefit of Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944).

Applying that basic canon of construction not only provides the most natural reading of the Act's text, but also preserves Congress's different treatment of the two types of discharges in light of their different impacts. As EPA and the Corps have explained, "[i]n keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, sections 404 and 402 employ different approaches to regulating the discharges to which they apply." 65 Fed. Reg. 21,293 (2000); see *Rapanos* v. *United States*, 547 U.S. 715, 745 (2006) (plurality opinion) (discussing distinction between dredged or fill material and other pollutants, and stating that "[t]he Act

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and (b) (amended by Clean Water Act of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599). If the Ninth Circuit were correct that all discharges (even those expressly excepted from the reach of Section 402) must comply with Section 402's requirements (principally, EPA effluent limitations), then Congress's amendment to Section 318 would have been unnecessary. Notably, Congress has not added such language to Section 404.

recognizes this distinction by providing a separate permitting program for such discharges in § 1344(a)").

Section 402 covers an array of "discharges such as wastewater discharges from industrial operations and sewage treatment plants, stormwater and the like." 65 Fed. Reg. at 21,293. Section 402 controls pollutant discharges by requiring compliance with various effluent limitations. *Ibid.* In particular, Section 402 expressly requires compliance with new-source performance standards promulgated by EPA pursuant to Section 306. 33 U.S.C. 1342(a)(1). The Section 402 permitting program does *not* require an evaluation of alternatives to a proposed discharge or consideration of impacts from discharges that convert waters of the United States to dry land. 65 Fed. Reg. at 21,293.

By contrast, Section 404 focuses exclusively on discharges of dredged and fill material. 33 U.S.C. 1344(a)(1). As the Corps and EPA have explained, "[f]ill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern [from the discharge of fill material] is the loss of a portion of the water body itself." 65 Fed. Reg. at 21,293. The Section 404 permitting process therefore focuses on considerations different from those implicated by the Section 402 program. *Ibid.*

The distinct concerns arising from the discharge of dredged or fill material are addressed primarily by the Section 404(b)(1) Guidelines, developed jointly by EPA and the Corps. 33 U.S.C. 1344(b). As described above (pp. 3-4, *supra*), the Section 404(b)(1) Guidelines take a broad-scale approach compared to Section 402's more targeted focus on water quality. The Guidelines preclude granting a permit if "there is a practicable alternative to the proposed discharge," including an alternative

that does not involve disposal into navigable waters, "which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a). The Guidelines also require consideration of the effects of the discharge on the aquatic ecosystem as a whole (40 C.F.R. 230.10(c)), as well as evaluation of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects (40 C.F.R. 230.10(d)).

That is not to say Section 404(b)(1) Guidelines disregard water-quality concerns. To the contrary, the Guidelines provide for the consideration of the effects of contaminants on water quality in a number of ways, specifically requiring compliance with applicable State water quality standards (40 C.F.R. 230.10(b)(1)); appropriate use of chemical and biological testing to evaluate contaminant effects (40 C.F.R. 230.11(d) and (e), 230.60, 230.61); and compliance with toxic effluent limitations promulgated under Section 307 (40 C.F.R. 230.10(b)(2)).

While the Act itself also authorizes EPA (in consultation with the Corps) to subject discharges of dredged material to toxic effluent limitations (33 U.S.C. 1317(a)(5)), neither Section 404 nor the Section 404(b)(1) Guidelines—in stark contrast to Section 402—require compliance with other effluent limitations, including Section 306's performance standards. That distinction reflects the careful balance struck by Congress and the administering agencies between water quality and the other weighty considerations when it comes to the discharge of dredged and fill material—a balance that the Ninth Circuit's decision fails to respect. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act,

it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).[5]

Finally, the Act's legislative history confirms that Congress intended to treat discharges of fill material differently from other discharges. As originally proposed in the Senate, the Act did not contain a separate permitting provision for discharges of fill material, but rather would have subjected them to EPA's permitting requirements under Section 402, including its effluent limitations. See S. 2770, 92d Cong. 1st Sess. § 402 (1971). In contrast, the House bill provided the Corps exclusive authority over discharges of fill material with only minimal EPA involvement. See 118 Cong. Rec. 10,632 (1972). The CWA, as enacted, reflects a compromise: it gives the Corps primary permitting authority over discharges of fill material but also gives EPA environmental oversight within the Section 404 process, both

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[5] A comparison of Sections 402(k) and 404(p), 33 U.S.C. 1342(k) and 1344(p), reinforces the conclusion that discharges of dredged and fill material are not subject to EPA's Section 306 performance standards. Section 402(k) states that, for purposes of the CWA's enforcement provisions, "[c]ompliance with a permit issued pursuant to [Section 402] shall be deemed compliance * * * with sections" 301, 302, 306, 307, and 403 of the CWA. Section 402(k) ensures that, in a citizen suit (see 33 U.S.C. 1365) alleging that a Section 402 permittee has violated Section 306, EPA's antecedent determination during the permitting process that the authorized discharges will satisfy new-source performance standards will be deemed controlling. With respect to Section 404 permittees, Section 404(p) confers an analogous immunity from enforcement actions but refers only to Sections 301, 307, and 403, not to Section 302 or 306. The absence of any reference to Section 306 would be inexplicable if Congress had anticipated that the Corps would apply new-source performance standards in considering applications for Section 404 permits.

through the Section 404(b)(1) Guidelines and through EPA's Section 404(c) veto power. 33 U.S.C. 1344; see S. Rep. No. 1236, 92nd Cong., 2d Sess. 1, 72-77, 141-142 (1972). Unlike the bill originally proposed in the Senate, the CWA as ultimately enacted does not require that discharges of fill material comply with EPA's effluent limitations under Section 402. See 33 U.S.C. 1344. The effect of the Ninth Circuit's decision in this case is thus to reinsert a requirement that Congress specifically considered but declined to enact, and to upset the balance struck by Congress in the permitting scheme that ultimately became law.

2. The Ninth Circuit's interpretation cannot be reconciled with the unambiguous terms of the Act

Notwithstanding Section 404's clear allocation to the Corps of permitting authority over discharges of fill material, and the absence in Section 404 of any reference to effluent limitations established by EPA (other than those under Section 307), the court of appeals concluded that such discharges must comply with Section 402's permitting requirements (and with Sections 301(e) and 306(e)) whenever a relevant effluent limitation exists. The court first relied (Pet. App. 15a) on Section 301(a)'s requirement that, "[e]xcept as in compliance with [Section 301] and [S]ections [302, 306, 307, 318, 402 and 404] * * * the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. 1311(a). In the court's view, the use of the word "and" in that list means that *all* discharges of pollutants into waters of the United States must comply with the requirements of *all* the listed provisions, including the effluent limitations of Sections 301 and 306.

The Ninth Circuit's reading of the general list of CWA provisions contained in Section 301(a) logically implies that dischargers of fill material must secure both a Section 402 permit and a Section 404 permit (in order to comply with Section 402 "and" Section 404). The court of appeals pointedly declined to embrace that conclusion, however, stating instead that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation under § 301 or a standard of performance under § 306." Pet. App. 18a. Respondents likewise recognize that, under the CWA, "only one permitting program is applicable to any given discharge." Br. in Opp. 20. And, under the plain terms of the statute, the determination of *which* permitting scheme applies (*i.e.*, Section 402 or Section 404) depends on whether the relevant pollutant constitutes "dredged or fill material"—not on whether the substance being discharged is otherwise potentially subject to an EPA effluent limitation.

Congress's use of the word "and" in Section 301(a) is best understood to mean that a discharge of pollutants into navigable waters is unlawful unless it complies with the *overall body of law* established by Sections 301, 302, 306, 307, 318, 402, and 404 taken together. If Congress were to provide in some other statute that particular pollutants may not be discharged "except as in compliance with the CWA," the reference to "the CWA" would of course encompass all of the specific provisions enumerated above. A directive that pollutant discharges comply with "the CWA," however, would not suggest that every CWA provision is applicable to every discharge. Similarly here, Section 301(a)'s requirement that every discharge comply with a defined subset of the

CWA does not answer which permitting regime applies to a particular type of discharges, including those at issue in this case.[6]

The court of appeals also relied on Sections 301(e) and 306(e). Pet. App. 12a-14a. Section 301(e) states that effluent limitations "shall be applied to all point sources of discharge of pollutants *in accordance with the provisions of this chapter*." 33 U.S.C. 1311(e) (emphasis added). Because the term "provisions of this chapter" encompasses the entire Act, that section simply begs the question whether Section 404, the governing provision, requires application of a particular effluent limitation to the discharge of fill material. Similarly, Section 306(e) makes it unlawful to operate any new source "in violation of any standard of performance *applicable to such source*." 33 U.S.C. 1316(e) (emphasis added). To determine whether a performance standard is applicable to a source, one must again refer back to the Act as a whole and, in particular, to Section 404 when the discharge of fill material is at issue. And, as explained above, the availability of a Section 404 permit for a discharge of fill material is not contingent on the regulated party's compliance with any new-source performance standard promulgated under Section 306.[7]

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[6] Congress could not have achieved greater clarity by using the word "or" rather than "and" in Section 301(a). To the contrary, use of the term "or" might have suggested that a discharge governed by Section 402 need only comply with Section 301 effluent limitations *or* Section 306 new-source performance standards—contrary to Section 402's express requirement that discharges subject to the NPDES permitting regime must satisfy both of those provisions. See 33 U.S.C. 1342(a)(1).

[7] The Ninth Circuit also relied (Pet. App. 14a-15a) on this Court's statement in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977) (*du Pont*), that effluent limitations promulgated under Sections

Thus, the text, structure, and purpose of the Act unambiguously establish a straightforward scheme. If a discharge of pollutants into waters of the United States constitutes a discharge of "dredged or fill material," then it is subject to Section 404's extensive permitting requirements, including the Section 404(b)(1) Guidelines. Other pollutant discharges into navigable waters, by contrast, are subject to Section 402's separate requirements, including new-source performance standards promulgated under Section 306. The court of appeals' decision in this case dismantles that carefully constructed framework and cannot be squared with the text of the statute enacted by Congress.

3. The Corps' and EPA's longstanding interpretations of the Act's regulatory scheme resolve any ambiguity

Even if the relevant CWA provisions did not squarely answer the question presented here, the Corps and EPA have reasonably resolved any ambiguity that may exist. See, *e.g.*, *Rapanos*, 547 U.S. at 758 ("Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway in interpreting the statute they are entrusted to administer.") (Roberts, C.J., concurring) (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984)). Since the Act's passage, those agencies consistently

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301 and 306 are meant to be "absolute prohibitions." The court of appeals' reliance on *du Pont* was misplaced. The Court in *du Pont* simply held that, *where the effluent limitations apply*, the CWA does not authorize variances for individual owners or operators. *Ibid.* The Court did not suggest that the performance standards apply to, or are to be enforced through, Section 404 permits. To the contrary, the Court referenced only permits issued under Section 402. *Id.* at 124. ("The permits granted under § 402 * * * incorporate these across-the-board limitations.").

have determined in rulemakings, permit actions, and official memoranda that discharges of fill material are regulated categorically by the Corps under Section 404 and are not subject to certain EPA effluent limitations, such as Section 306 performance standards. Those long-standing administrative determinations are entitled to respect.

First, in 1973, EPA promulgated a regulation providing that "[d]redged or fill material discharged into navigable waters" does "*not* require an NPDES [*i.e.*, Section 402] permit." 40 C.F.R. 125.4(d) (1973) (emphasis added). That regulation is still in place today, in virtually identical form. 40 C.F.R. 122.3(b). Second, as noted earlier (pp. 21-22, *supra*), the Section 404(b)(1) Guidelines (first issued in 1975)—while requiring discharges of fill material to comply with toxic effluent standards promulgated under Section 307 (40 C.F.R. 230.10(b)(2)) —do not require compliance with other effluent limitations, including Section 306 performance standards. Third, in 1986, the Corps and EPA clarified that "[d]ischarges listed in the Corps' definition of 'discharge of fill material' * * * remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8871. Fourth, the Corps and EPA stated in the preamble to the 2002 fill rule that "[e]ffluent limitation guidelines and new source performance standards ('effluent guidelines') promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section *402* of the Act. *EPA has never sought to regulate fill material under effluent guidelines.*" 67 Fed. Reg. at 31,135 (emphasis added).

The agencies also have made clear that their long-standing administrative interpretations of the CWA's permitting requirements apply to the discharges at issue in this case. For example, EPA concluded in an authoritative 2004 memorandum that, because the proposed discharges at issue here would constitute discharges of fill material, "the regulatory regime applicable to discharges under section 402, *including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J)*, do *not* apply to the placement of tailings into the proposed impoundment." J.A. 144a-145a (emphasis added). Likewise, the Corps' issuance of the Section 404 permit (accompanied by a 68-page Revised ROD and Permit Evaluation) for Coeur's proposed discharges, notwithstanding the existence of the Section 306 new-source performance standard for mines using the froth-flotation process, confirms the Corps' agreement with EPA's interpretation. J.A. 340a-377a.

Underlying all those agency expressions, spanning from 1973 to the present, is the determination that a discharge of fill material should be regulated under Section 404, notwithstanding EPA's promulgation of a Section 306 performance standard that might otherwise be applicable under Section 402. For all the reasons discussed above (pp. 17-26, *supra*), the Corps' and EPA's interpretations are reasonable. The Ninth Circuit thus erred in substituting its own construction of the Act. See *Chevron*, 467 U.S. at 843.

B. The Corps And EPA Properly Concluded That The Proposed Discharge Of Mine Tailings Constitutes A "Discharge Of Fill Material"

Because a discharge of fill material is subject to regulation under Section 404, and thus not subject to a Section 306 performance standard, the only remaining question is whether the discharge of tailings at issue here qualifies as a "discharge of fill material." The answer from both expert agencies charged with administering the Act—consistent with the plain terms of their jointly promulgated regulation—is yes.

1. The agencies' considered adoption of an effects-based definition of "fill material" provides an administrable line between Section 402 and Section 404 discharges

Because the Act does not define the term "fill material," "the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Corps and EPA have filled the statutory gap by jointly promulgating the 2002 fill rule, which defines "fill material" to mean

> material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
> (ii) Changing the bottom elevation of any portion of a water of the United States.

33 C.F.R. 323.2(e)(1) (Corps regulation); 40 C.F.R. 232.2 (EPA regulation). The rule specifically defines "discharge of fill material" to include the "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. 323.2(f); 40 C.F.R. 232.2.

That, of course, is not the only conceivable definition. Indeed, the Corps and EPA have modified their respective definitions of "fill material" over the years. The current regulatory definition, however, is reasonable and thus entitled to deference—especially given that the agencies explained at great length their reasons for the 2002 revision. See, *e.g.*, *Chevron*, 467 U.S. at 863-864 ("[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

Before promulgation of the 2002 fill rule, "the Army and EPA definitions of 'fill material' differ[ed] from each other, and this * * * resulted in regulatory uncertainty and confusion." 65 Fed. Reg. at 21,292. The principal difference (at least since 1980) was that the Corps' definition of the term "fill material" was based on the "primary purpose" of the discharge (*i.e.*, whether it was intended to create fill or rather to dispose of waste), whereas EPA's definition was based solely on the *effects* of the discharge (*i.e.*, whether it converted waters to dry land or changed the bottom elevation of the relevant waterbody).[8] The 2002 fill rule, which contains the agen-

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[8] In 1975, the Corps and EPA both defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body *for any purpose*." 40 Fed. Reg. at 31,325; *id.* at 41,298 (emphasis added). In 1977, the Corps redefined "fill material" as "any material used *for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402." 42 Fed. Reg. at 37,145 (emphasis added). In 1980, EPA revised its definition of "fill material" to mean (consistent with both the 1975 and the current definition) "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a

cies' joint definition of the term "fill material," was intended to resolve that discrepancy and to "ensure proper, consistent, and more effective regulation under the CWA." *Ibid.*

In reconciling their prior definitions, the Corps and EPA chose the effects-based approach over the "primary purpose" approach, excising any reference to the purpose of the discharge. The agencies explained that the "primary purpose" test had required the Corps to make difficult subjective determinations about the purposes of prospective discharges, allowed manipulation by prospective dischargers, and caused inconsistent treatment of similar discharges. 65 Fed. Reg. at 21,294. That led to confusion and engendered extensive litigation, undermining the Section 404 program's ability to protect the aquatic environment and the overall public interest. *Ibid.* The agencies reasoned that those problems could be avoided by adopting an objective definition of "fill material," similar to that already used by EPA, based on the effect of the proposed discharge rather than on its purpose. *Id.* at 21,294-21,295; see 67 Fed. Reg. at 31,132-31,133 ("[T]he objective standard created by the effects-based test will yield more consistent results in determining what is 'fill material'" and "help[] ensure that discharges with similar environmen-

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water body *for any purpose*." 45 Fed. Reg. at 33,421 (emphasis added). In 1986, in their last pronouncement before the 2002 fill rule, the Corps and EPA entered into a Memorandum of Agreement (MOA) to clarify the appropriate permitting program for regulating certain discharges of solid waste arising from their then-conflicting definitions of "fill material." 51 Fed. Reg. at 8871. That MOA adopted a case-specific approach, drawing on elements from both agencies' definitions as part of a multi-factor inquiry to determine whether a discharge involved "fill material." *Id.* at 8872.

tal effects will be treated in a similar manner under the regulatory program."). As the Corps and EPA concluded, "these benefits provide sufficient justification for [the] rule change." *Id.* at 31,132.

In response to comments, the Corps and EPA noted the absence of "any indication that Congress intended to exclude discharges for purposes of waste disposal entirely from coverage under section 404." 67 Fed. Reg. at 31,134. The agencies explained that "[s]imply because a material is disposed of for purposes of waste disposal does not, in our view, justify excluding it categorically from the definition of fill. * * * Instead, where a waste has the effect of fill, we believe that regulation under the section 404 program is appropriate." *Id.* at 31,133. The agencies further observed that the 2002 fill rule is generally "consistent with existing regulatory practice," under which the Corps pursuant to Section 404, rather than EPA pursuant to Section 402, has regulated such discharges. *Id.* at 31,129-31,130.

The fill rule promulgated by the Corps and EPA in 2002 reflects a reasonable interpretation of the term "fill material" in Section 404. Indeed, the court of appeals did not suggest, and respondents do not appear to contend, that the proposed discharges at issue here fall outside Section 404 simply because they would be undertaken to achieve waste-disposal objectives rather than *for the purpose* of raising the bottom elevation of Lower Slate Lake.

2. The agencies' conclusion that the proposed discharge constitutes a "discharge of fill material" under the fill rule is controlling

Under the plain terms of the current regulatory definition, the tailings slurry at issue in this case unquestionably constitutes "fill material." That is so both because the placement of tailings into the impoundment Lower Slate Lake will have "the effect of * * * [c]hanging the bottom elevation of a water of the United States," 33 C.F.R. 323.2(e)(1); 40 C.F.R. 232.2, and because the regulatory definition of "discharge of fill material" specifically encompasses the "placement of overburden, slurry, or tailings or similar mining-related materials," 33 C.F.R. 323.2(f); 40 C.F.R. 232.2. The text of the regulation is therefore dispositive here.

The court of appeals construed the fill rule to provide that "wastes subject to performance standards and effluent limitations would not be considered 'fill material.'" Pet. App. 20a. Nothing in the regulation itself, however, suggests that a particular discharge's status as "fill material" subject to the Section 404 permitting process turns on whether EPA has issued an effluent limitation for the discharge of a particular pollutant. To the contrary, by its terms, the applicability of the regulatory definition depends on whether the discharge will replace a portion of the waters of the United States with dry land or raise the bottom elevation of a navigable waterbody. Nor did the court of appeals identify any common understanding of the term "fill material" that would attach decisive weight to the presence or absence of an EPA effluent limitation.

In concluding that the agencies intended Section 402 to govern the discharges at issue here, see Pet. App. 20a, 22a-31a, the court of appeals focused not on the text

of the regulation, but on selected statements from the preamble of the fill rule and other regulatory history. Neither the preamble nor the regulatory history, however, can trump the unambiguous text of the rule. See *National Wildlife Fed'n* v. *EPA*, 286 F.3d 554, 569-570 (D.C. Cir. 2002) ("The preamble to a rule is not more binding than a preamble to a statute. * * * Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.") (citation omitted); cf. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.") (quoting *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994)). The authority suggesting that an agency's interpretation of its regulation cannot conflict with the agency's intent at the time of promulgation—see Pet. App. 19a-20a (citing cases)—comes into play only where the regulation's text is ambiguous. See, *e.g.*, *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 37 (2005) ("Whatever the correct explanation for the Secretary's ambiguous (and apparently ambivalent) statement may be, it is not sufficient to overcome the clear statements in the text of the regulations that support our holding."); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945) (canons of regulatory construction triggered only "if the meaning of the words used is in doubt"). That is not the case here.

Rather, where the terms of the regulation are clear, and the agency interpretation is consistent with those terms, that interpretation is "controlling." *Auer*, 519 U.S. at 460-461 (agency interpretation is "controlling unless plainly erroneous or inconsistent with the regulation") (citation omitted). EPA and the Corps agree that "the text of the rule makes clear that mine tailings

placed into impounded waters of the U.S., as proposed by the Kensington mine project, are regulated under section 404 of the CWA as a discharge of fill material." J.A. 144a; see J.A. 340a-377a. Deference to the agencies' construction is especially warranted here because the regulation concerns "a complex and highly technical regulatory program," in which the relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). In substituting its determination for the agencies', the Ninth Circuit impermissibly abandoned those key principles.

On the whole, moreover, the preamble and regulatory history are consistent with the Corps' and EPA's determination under the fill rule that the tailings discharges at issue here should be regulated under Section 404. The Ninth Circuit focused (Pet. App. 26a-29a) on isolated statements in the preamble and in the agencies' joint Response to Comments that could be read to suggest that discharges subject to effluent limitations should be regulated under Section 402.[9] In the same

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[9] The cited passage from the preamble reads:

> [W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified wastestreams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some dis-

preamble, however, the agencies stated that "EPA has never sought to regulate fill material under effluent guidelines"; that "any mining-related material that has the effect of fill when discharged will be regulated as 'fill material'"; that "the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials"; and that "the phrase[] * * *

---

charges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA. Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs.

67 Fed. Reg. at 31,135.

The cited excerpts from the agencies' Response to Comments read:

- [U]nder today's rule, we will continue, consistent with our long-standing practice, to rely on the existence of effluent limitation guidelines or standards or an NPDES permit to inform the determination of how a particular discharge is regulated under the Act. If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa. J.A. 83a.
- [T]he suggestion that this rulemaking now provides a legal basis for previously illegal activities is not the case—no discharges that were previously prohibited are now authorized as a result of this rulemaking. J.A. 32a.
- Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid. J.A. 48a.

'placement of overburden, slurry, or tailings or similar mining-related materials' ha[s] been added to the definition of 'discharge of fill material' to provide further clarification of the types of activities regulated under section 404." 67 Fed. Reg. at 31,130, 31,135. And, in their Response to Comments, the Corps and EPA stated (after referring to "the two broad categories" of overburden and mining by-products) that "[w]here the discharge of both types of materials into waters of the United States will result [] in a change in the bottom elevation, * * * both materials clearly qualify as 'fill material' under this rule, and their discharge into waters of the United States will be regulated by the Corps under section 404 of the Act." J.A. 93a.

To be sure, the preamble is scarcely a model of clarity, but the latter statements—specific to mining materials—should control over the more general statements regarding the treatment of discharges subject to effluent limitations. And the rule's text (which expressly *includes* the discharge of tailings) contains no exception from the definition of fill material based on the existence of effluent limitations promulgated under Sections 301, 304, or 306; nor does it state that discharges potentially subject to such limitations are to be regulated under Section 402 instead. Indeed, the Corps and EPA considered but deleted such an exception when finalizing the proposed rule. See 67 Fed. Reg. at 31,135.

The court of appeals also relied (Pet. App. 30a-31a) on the pre-permit history in this case, citing the Corps' 1998 ROD and EPA's 2005 ROD. The court, however, misunderstood the statements upon which it relied. The court noted the Corps' statement in the 1998 ROD that the Corps "does not regulate the placement of tailings." Pet. App. 31a (quoting C.A. E.R. 257). But, as the con-

text makes clear, the Corps there was referring to the placement of tailings *into a dry stack* (the storage method proposed at that time), which requires no CWA permit (either under Section 404 or under Section 402) because it does not involve a discharge into the waters of the United States. See C.A. E.R. 257. The court of appeals also relied on EPA's determination in the 2005 ROD that, "[b]ecause this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project." Pet. App. 31a (quoting J.A. 291a). But that statement referred to the need for a Section 402 permit for the discharge *from* the tailings impoundment, not into it. See J.A. 292a, 301a-305a. In any event, earlier statements by an agency are irrelevant because courts ordinarily are "empowered to review only an agency's *final* action." *National Assoc. of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007). That principle is especially pertinent where, as here, the governing rule has changed during the administrative process. Accordingly, the regulatory history provides no basis for displacing either the rule's plain language or the agencies' controlling interpretation of that language.[10]

Nor does the 1982 new-source performance standard (limiting discharge of process wastewater from froth-

[10] The Ninth Circuit also cited (Pet. App. 24a n.10) two Corps memoranda for the proposition that the Corps has regularly declined to exercise Section 404 permitting authority over the discharge of mine tailings. Those internal, informal memoranda were prepared under the Corps' former "primary purpose" definition of "fill material," which was superseded by the 2002 regulation. In any event, those memoranda by agency personnel in the field did not purport to decide the Corps' official position even at the time they were drafted. See C.A. E.R. 178 ("requesting that the question be referred to the Washington level for resolution").

flotation gold mills, 40 C.F.R. 440.104) require a different outcome. That standard does not unambiguously contemplate application to discharges of fill material (such as mine tailings) regulated under Section 404. EPA explained in the preamble to that standard that "[t]he requirements for direct dischargers were to be incorporated into [NPDES] permits issued under section 402 of the Act," not into Section 404 permits. 47 Fed. Reg. 25,682 (1982). In the 26 years since promulgation of that new-source performance standard, EPA has never applied it to a discharge that EPA and the Corps had determined to be a discharge of fill material. See 67 Fed. Reg. at 31,135 ("EPA has never sought to regulate fill material under effluent guidelines."). And EPA has made clear its view that the 1982 performance standard does *not* apply to the proposed discharges at issue in this case. J.A. 144a-145a ("the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J), do not apply to the placement of tailings into the proposed impoundment").

Contrary to the Ninth Circuit's suggestion (Pet. App. 31a-32a), the fill rule does not render the 1982 new-source performance standard a practical nullity. Where a particular discharge of process wastewater from a froth-flotation mill does not satisfy the definition of fill material (*e.g.*, because its ratio of liquid to solids is such that the discharge would not be expected to raise the bottom elevation of the relevant waterbody), the discharge is regulated under Section 402 and thus remains subject to the performance standard. Conversely, however, the Ninth Circuit's decision *does* effectively nullify the portion of the 2002 fill rule that specifically includes

tailings within the regulatory definition of "discharge of fill material."

It is also not evident that application of the 1982 standard would necessarily be more environmentally protective than application of the Section 404(b)(1) Guidelines. In this case, for example, the Forest Service and the Corps (based on its Section 404 analysis, which includes consideration of the loss of wetlands and other environmental factors not considered under Section 402) both determined that the discharge into the Lower Slate Lake impoundment was the "environmentally preferable alternative." J.A. 218a, 354a. And respondents did not challenge that determination below. In any event, the 1982 standard predates the definition of "fill material" in the 2002 fill rule, which expressly brings the discharge of mine tailings into Section 404's regime. The later-in-time regulation, jointly adopted by the Corps and EPA and amply supported by the agencies' detailed explanations, is controlling here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 301 of the Clean Water Act, 33 U.S.C. 1311, provides in relevant part:

Effluent Limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

* * * * *

2. Section 306 of the Clean Water Act, 33 U.S.C. 1316, provides in relevant part:

National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction

which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

* * * * *

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

3. Section 307 of the Clean Water Act, 33 U.S.C. 1317, provides in relevant part:

Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

* * * * *

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best

available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements.

* * * * *

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

* * * * *

4. Section 402 of the Clean Water Act, 33 U.S.C. 1342, provides in relevant part:

National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable require-

ments under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

* * * * *

5. Section 404 of the Clean Water Act, 33 U.S.C. 1344, provides in relevant part:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application addition-

ally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

* * * * *

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and

1365 of this title, with sections 1311, 1317, and 1343 of this title.

* * * * *

6. Section 502 of the Clean Water Act, 33 U.S.C. 1362, provides in relevant part:

Definitions

* * * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

7. 33 C.F.R. 323.2 provides in relevant part:

Definitions.

For the purpose of this part, the following terms are defined:

* * * * *

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facil-

ities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

* * * * *

8. 40 C.F.R. 122.3 provides in relevant part:

Exclusions.

The following discharges do not require NPDES permits:

* * * * *

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

* * * * *

9. 40 C.F.R. 230.10 provides:

Restrictions on discharge.

NOTE: Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement of these Guidelines will not automatically receive a permit.

Although all requirements in §230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill

its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

(b) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their by-products outside of the disposal site through biological, physical, and chemical processes;

(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(d) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

10. 40 C.F.R. 232.2 provides in relevant part:

Definitions.

* * * * *

Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; * * * and artificial reefs.

* * * * *

Fill material. (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

* * * * *

11. 40 C.F.R. 440.104 provides, in relevant part:

New source performance standards (NSPS).

Except as provided in Subpart L of this part any new source subject to this subsection must achieve the following NSPS representing the degree of effluent reduction attainable by the application of the best available demonstrated technology (BADT):

(a) The concentration of pollutants discharged in mine drainage from mines that produce copper, lead, zinc, gold, silver, or molydbenum bearing ores or any combination of these ores from open-pit or underground operations other than placer deposits shall not exceed:

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter	
Cu	0.30	0.15
Zn	1.5	0.75
Pb	0.6	0.3
Hg	0.002	0.001
Cd	0.10	0.05
pH	(1)	(1)
TSS	30.0	20.0

[1] Within the range 6.0 to 9.0.

(b)(1) Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores. The Agency recognizes that the elimination of the discharge of pollutants to navigable waters may result in an increase in discharges of some pollutants to other media. The Agency has considered these impacts and has addressed them in the preamble published on December 3, 1982.

* * * * *

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS SOUTHEAST ALASKA CONSERVATION COUNCIL, SIERRA CLUB, AND LYNN CANAL CONSERVATION

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QUESTION PRESENTED

Does the Army Corps of Engineers have authority under section 404 of the Clean Water Act to grant a "fill material" permit for an industrial process wastewater discharge from a newly constructed ore beneficiation mill, when the discharge is prohibited by a new source performance standard adopted by the Environmental Protection Agency under section 306 of the Act?

PARTIES TO THE PROCEEDINGS

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation concur in the State of Alaska's statement of the Parties to the Proceedings.

RULE 29.6 STATEMENT

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES vi
STATUTES AND REGULATIONS INVOLVED 1
INTRODUCTION 1
STATEMENT 2
SUMMARY OF ARGUMENT 20
ARGUMENT 23
I. UNDER THE PLAIN LANGUAGE OF THE CLEAN WATER ACT, THE CORPS LACKS AUTHORITY TO PERMIT WASTEWATER DISCHARGES FROM SOURCES SUBJECT TO EPA PERFORMANCE STANDARDS. 23
A. Section 306(e) Prohibits Any Wastewater Discharge from the Kensington Mill. 23
B. There Is No Conflict Between Section 306(e) and Section 404 26
C. Section 306(e) Has No Implied Exception for Fill Material. 29
1. Courts Should Rarely Infer Exceptions 31

2. Sections 306 and 404 Reflect a Deliberate Choice by Congress Not to Include the Exception Sought by the Corps. 32

3. Sections 301 and 306 Have Independent Effect and Do Not Depend on Other Provisions to Trigger Them. 33

4. Neither Section 402 nor Section 307 Establishes an Implied Exception to Section 306(e). 36

5. The Ninth Circuit Correctly Interpreted Section 301(a). 38

D. The Language and History of the Act Demonstrate That Congress Intended Wastewater Discharges from Ore Beneficiation Mills to Be Governed by Section 402 Permits. 40

E. Exempting Wastewater Discharges Containing Solids from Effluent Limitations Would Undermine Congressional Goals. 44

II. IF THE CLEAN WATER ACT WERE AMBIGUOUS, THE COURT SHOULD DEFER TO THE INTERPRETATION STATED BY THE HEADS OF BOTH AGENCIES UPON PROMULGATION OF THE 2002 FILL RULE. 46

A. The Agencies' Regulations Reveal that Some Discharges Meeting the Definition of "Fill Material" Are Subject to Effluent Limitations and NPDES Permits. 46

B. EPA Intended the Effluent Limitations for Ore Beneficiation Mills to Be Applied in Permits Under Section 402, Not 404. 49

C. When the Agencies Adopted Their New Definition of Fill Material in 2002, They Did Not Intend to Change Past Practice 55

D. The Regas Memo Could Not Change the Agencies' Authoritative Interpretation Published in the Federal Register 58

CONCLUSION 60

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska Prof'l Hunters Ass'n v. FAA,
177 F.3d 1030 (D.C. Cir. 1999) 59

Andrus v. Glover Const. Co.,
446 U.S. 608 (1980) 31-32

Auer v. Robbins,
519 U.S. 452 (1997) 58

Chem. Mfrs. Ass'n v. NRDC,
470 U.S. 116 (1985) 6

Chevron, U.S.A. v. NRDC,
467 U.S. 837 (1984) 17, 20, 23, 46

E.I. du Pont de Nemours & Co. v. Train,
430 U.S. 112 (1977) 6, 7, 24, 31, 34

Garberding v. Jenkins,
485 U.S. 415 (1988) 59

Gonzales v. Oregon.,
546 U.S. 243 (2006) 59

Helvering v. Hammel,
311 U.S. 504 (1941) 21

Hillsborough County v. Automated Med. Labs., Inc.,
471 U.S. 707 (1985) 58

Kalur v. Resor,
335 F. Supp. 1 (D.D.C. 1971) 41

TABLE OF AUTHORITIES–Continued

Page(s)

Kentuckians for the Commonwealth v. Rivenburgh,
317 F.3d 425 (4th Cir. 2003) 11, 44, 52

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 18, 55, 58

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
127 S. Ct. 2518 (2007) 29

Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.,
534 U.S. 327 (2002) 28

Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs,
No. 3:05-0784, 2007 WL 2200686
(S.D. W.Va. June 13, 2007) 54

Radzanower v. Touche Ross & Co.,
326 U.S. 148 (1976) 49

Reserve Mining Co. v. EPA,
514 F.2d 492 (8th Cir. 1975) 42, 43, 51

S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,
547 U.S. 370 (2006) 37

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 58

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 31

TABLE OF AUTHORITIES–Continued

Page(s)

United States v. Mead Corp.,
533 U.S. 218 (2001) 59

United States v. Oakland Cannabis Buyers' Coop.,
532 U.S. 483 (2001) 31, 32

United States v. Pa. Indus. Chem. Corp.,
411 U.S. 655 (1973) 40, 41

United States v. Republic Steel Corp.,
362 U.S. 482 (1960) 41

United States v. Rutherford,
442 U.S. 544 (1979) 18, 21, 31, 32

STATUTES

Administrative Procedure Act,

5 U.S.C. § 706(2)(A) 58

Rivers and Harbors Act § 10,

33 U.S.C. § 403 41

Refuse Act,

33 U.S.C. § 407 .....22, 40

Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") as amended:

§ 101(a)(1), 33 U.S.C. § 1251(a)(1)

.....5, 21, 30, 32, 44

TABLE OF AUTHORITIES–Continued

Page(s)

§ 301(a), 33 U.S.C. § 1311(a) 7, 33, 34, 35, 38, 39
§ 301(b), 33 U.S.C. § 1311(b).....6, 7, 30, 34
§ 301(c), 33 U.S.C. § 1311(c)..... 35
§ 301(e), 33 U.S.C. § 1311(e) 7, 17, 26, 34
§ 301(f), 33 U.S.C. § 1311(f) 33
§ 301(h), 33 U.S.C. § 1311(h) 35
§ 301(j), 33 U.S.C. § 1311(j).....33, 35
§ 301(k), 33 U.S.C. § 1311(k)..... 35
§ 301(*l*), 33 U.S.C. § 1311(*l*) 33
§ 301(m), 33 U.S.C. § 1311(m) 35
§ 301(n), 33 U.S.C. § 1311(n) 35
§ 301(p), 33 U.S.C. § 1311(p)..... 35
§ 304(a), 33 U.S.C. § 1314(a)..... 1, 30
§ 304(b)-(c), 33 U.S.C.§ 1314(b)-(c)..... 6
§ 306, 33 U.S.C. § 1316..... 6, 38
§ 306(a)(1), 33 U.S.C. § 1316(a)(1) 6, 8, 25, 30, 32
§ 306(a)(2), 33 U.S.C. § 1316(a)(2) 29
§ 306(a)(3), 33 U.S.C. § 1316(a)(3) 25, 29
§ 306(b), 33 U.S.C. § 1316(b)..... 29
§ 306(d), 33 U.S.C. § 1316(d)..... 33

TABLE OF AUTHORITIES–Continued

Page(s)

§ 306(e), 33 U.S.C. § 1316(e) 7, 17, 20, 24, 25, 27, 33, 34
§ 307, 33 U.S.C. § 1317 6
§ 307(a)(5), 33 U.S.C. § 1317(a)(5) 37
§ 307(d), 33 U.S.C. § 1317(d) 7
§ 309, 33 U.S.C. § 1319 .....21, 28, 35
§ 312, 33 U.S.C. § 1322 33
§ 318, 33 U.S.C. § 1328 38
§ 402(a)(1), 33 U.S.C. § 1342(a)(1) 7, 33, 36, 37, 38, 39, 48
§ 402(a)(5), 33 U.S.C. § 1342(a)(5) 22, 40, 43
§ 402(k), 33 U.S.C. § 1342(k) 28, 37, 40
§ 404, 33 U.S.C. § 1344 .....7, 21, 36
§ 404(a), 33 U.S.C. § 1344(a) 20, 21, 27, 29, 33
§ 404(b), 33 U.S.C. § 1344(b) 29, 37
§ 404(f), 33 U.S.C. § 1344(f) 32, 33, 37, 50
§ 404(h), 33 U.S.C. § 1344(h) 37, 50
§ 404(n), 33 U.S.C. § 1344(n) 21, 28, 35
§ 404(p), 33 U.S.C. § 1344(p) 21, 28, 37, 50
§ 404(r), 33 U.S.C. § 1344(r) 32, 37, 50
§ 404(s), 33 U.S.C. § 1344(s) 28
§ 405(a), 33 U.S.C. § 1345(a) 33

TABLE OF AUTHORITIES–Continued

Page(s)

§ 502(6), 33 U.S.C. § 1362(6) 29
§ 502(7), 33 U.S.C. § 1362(7) 5
§ 502(11), 33 U.S.C. § 1362(11) 6
§ 502(12), 33 U.S.C. § 1362(12) 29
§ 502(14), 33 U.S.C. § 1362(14) 29
§ 504(a), 33 U.S.C. § 1364(a) 33
§ 505, 33 U.S.C. § 1365 ..... 33, 35
§ 511(d), 33 U.S.C. § 1371(d) 33

CONGRESSIONAL MATERIALS:

118 Cong. Rec. 33,705-06 (1972) 43
118 Cong. Rec. 33,713 (1972) 43
118 Cong. Rec. 33,765 (1972) 42
118 Cong. Rec. 36,780 (1972) 42
S. Rep. No. 92-414 (1971) 6, 7, 24, 31, 41

REGULATIONS

33 C.F.R.
Part 320
Section 320.3 27
Part 323
Section 323.2(e) 11, 46
Section 323.3(f) 44, 46, 57

TABLE OF AUTHORITIES–Continued

Page(s)

40 C.F.R.

Part 122

Section 122.2 ..... 16, 53

Section 122.3(b) 47, 50

Part 230

Section 230.10 27

Section 230.10(a)(4)-(5) 27

Section 230.10(b)(2) 50, 57

Section 230.10(b)(3)-(4) 27

Part 401

Section 401.11(f) 3

Section 401.11(q) 3, 49

Section 401.11(r) 3

Section 401.15(7) 51

Part 412

Section 412.31(a) 45

Part 436 57-58

Part 440

Section 440.52(b) 10

Section 440.54(b) 10

Section 440.90-.95 57

Section 440.100(a)(2) 24

Section 440.102(b) 26

TABLE OF AUTHORITIES–Continued

Page(s)

Section 440.104(b)(1) 8, 15, 17, 24, 25, 47, 49
Section 440.110-.115 57
Section 440.132(f) 2

ADMINISTRATIVE MATERIALS

33 Fed. Reg. 18,670 (Dec. 18, 1968) 41
36 Fed. Reg. 6564 (April 7, 1971) 40, 41
38 Fed. Reg. 24,462 (Sept. 7, 1973) 45
38 Fed. Reg. 29,008 (Oct. 18, 1973) 45
38 Fed. Reg. 33,170 (Nov. 30, 1973) 45
40 Fed. Reg. 51,722 (Nov. 6, 1975) 8, 9
40 Fed. Reg. 51,748 (Nov. 6, 1975) 7
42 Fed. Reg. 37,122 (July 19, 1977) 10
42 Fed. Reg. 37,294 (July 20, 1977) 45
44 Fed. Reg. 32,854 (June 7, 1979) 48
45 Fed. Reg. 33,290 (May 19, 1980) 48
45 Fed. Reg. 44,926 (July 2, 1980) 45
45 Fed. Reg. 68,328 (Oct. 14, 1980) 45
47 Fed. Reg. 25,682 (June 14, 1982) 2, 3, 8, 9, 10, 50, 51, 55
47 Fed. Reg. 31,794 (July 22, 1982) 54, 55

TABLE OF AUTHORITIES–Continued

Page(s)

47 Fed. Reg. 54,598 (Dec. 3, 1982) 8, 9, 10, 50, 51

49 Fed. Reg. 9108 (March 9, 1984) 45

51 Fed. Reg. 8871 (March 14, 1986) 10, 52

65 Fed. Reg. 21,292 (April 20, 2000) 12, 14, 56

66 Fed. Reg. 2960 (Jan. 12, 2001) 45

67 Fed. Reg. 31,129 (May 9, 2002) 12, 13, 56

67 Fed. Reg. 57,872 (Sept. 12, 2002) 45

MISCELLANEOUS

Army Corps of Engineers, *Qs and As on the "Fill" Rule* 13

Kate Golden, *EPA puzzled by Coeur Alaska pullout*, Juneau Empire, Sept. 25, 2008. 19

Robert W. Adler, Jessica C. Landman, & Diane M. Cameron, *The Clean Water Act 20 Years Later* (1993) 30

The Chicago Manual of Style (15th ed. 2003)..... 47

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the statutes and regulations involved in this case, including Clean Water Act sections 301, 304, 306, 307, 309, 402, 404, and 502 (33 U.S.C. §§ 1311, 1314, 1316, 1317, 1319, 1342, 1344, 1362), 33 C.F.R. § 323.2, and 40 C.F.R. §§ 122.2, 122.3, 230.10, 401.11, 440.100, 440.104, and 440.132, are reproduced in the appendix to this brief.

INTRODUCTION

The Clean Water Act identifies by name just four "conventional pollutants" that the Environmental Protection Agency (EPA) must regulate, two of which are suspended solids and pH. 33 U.S.C. § 1314(a)(4). One of the most common technologies for removing suspended solids is the settling pond, an artificial structure that allows solids to settle out before any wastewater is discharged into navigable waters. In adopting effluent limitations, the Act's principal regulatory mechanism for controlling pollution, EPA has identified settling ponds as the best technology for many industries to reduce or eliminate suspended solids.

At issue here is whether a new source of pollution may escape strict EPA performance standards by using a navigable lake as its settling pond. The type of source here—a newly constructed mill for processing gold ores—has been subject to EPA effluent limitations since 1975 and to a new source performance standard prohibiting any wastewater discharges since 1982. In an unprecedented decision, the Army Corps of Engineers granted a permit to discharge the

mill's process wastewater directly into a lake as "fill material," bypassing EPA's no-discharge standard. The Corps acknowledged that the mill would use the lake as a "settling pond" to remove suspended solids and dilute elevated pH. J.A. 360a.

While this approach is undeniably cheaper for the mill owner, it defeats the purpose of the Clean Water Act and EPA's effluent limitations, which is to reduce or eliminate pollutants *before* they are discharged to navigable waters. More to the point, it violates both the plain language of the Act and the stated intent of the agencies when they adopted the relevant regulations. Upholding this approach would vitiate the effluent limitations not only for ore mills, but for the many other industrial sources whose process wastewater contains significant quantities of suspended solids.

STATEMENT

1. Beneficiation mills process ores to make them suitable for refining or smelting. *See* 40 C.F.R. § 440.132(f). In the "froth-flotation" process, a mill grinds large quantities of ore into fine particles and introduces water, air, and chemicals in large tanks. The mill at the Kensington Mine, for example, will use potassium amyl xanthate (a conditioner), MIBC (a frother), flocculants, polymers, surfactants, scale inhibitors, and lime. This process creates a gold-bearing froth that floats to the top and is removed for further processing off-site. *See* J.A. 189a-91a; 47 Fed. Reg. 25,682, 25,684 (June 14, 1982).

Left in the tanks is process wastewater, a slurry consisting of water, chemicals, metals, and sus-

pended solids (or "tailings").[1] According to EPA, process wastewater from froth-flotation mills "is characterized by very high suspended solids levels (often in the percent range rather than milligrams per liter), high metals levels, and process reagents such as cyanide." 47 Fed. Reg. at 25,685. Metals dissolved in the wastewater are reduced by raising the pH, typically with lime, causing the metals to precipitate. *Id.* at 25,691, 25,692. The resulting elevated pH levels can be toxic to aquatic life. *See* J.A. 206a.

The process wastewater from the froth-flotation mill at the Kensington Mine will be 70% water and 30% solids by volume. *See* J.A. 304a (total slurry

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[1] "Tailings" is an imprecise term, undefined in the statutes and regulations at issue. Petitioners and the Corps most often use it to refer to the solid component of the process wastewater. *See, e.g.*, Fed. Br. at 6; Coeur Br. at 6; State Br. at 12. However, record documents sometimes use it to refer to the entire wastewater slurry. *See, e.g.*, J.A. 192a (describing tailings as material remaining in flotation tanks after processing and transported as slurry), 206a (measuring tailings in gallons per minute), 263a (requiring monitoring of dissolved solids in tailings).

EPA's regulations define "process wastewater" to include any water that comes into contact with, or results from the production of, any waste product. 40 C.F.R. § 401.11(q). It includes "pollutants," such as "solid waste," *id.* § 401.11(f), "present in process waste water." *Id.* § 401.11(r). EPA uses the term to describe discharges with high levels of suspended solids, *see* 47 Fed. Reg. at 25,685, "including mine tailings." J.A. 291a.

There is no dispute that the discharge in this case is process wastewater. The section 404 permit at issue authorizes discharge of the entire wastewater slurry, not just the solids. *See* J.A. 275a (¶ 10), 304a, 360a-61a.

throughput will be 354 gallons per minute, of which 247 will be water). By weight, it will be about 45% water and 55% solids. *Id.* It will be sufficiently liquid to flow at a rate of 354 gallons per minute, by gravity, for 3.5 miles through a 6-inch pipe without clogging. *See id.*; J.A. 194a. At this rate, the discharge would be about 510,000 gallons per day.[2]

If discharged into a lake, river, stream, or wetland, the process wastewater of the Kensington mill would, like that of other such mills, cause substantial pollution. The wastewater will have a pH of about 10, which would be toxic to aquatic life and expected to dilute in the lake. J.A. 206a, 360a. It will contain "trace concentrations of metals bearing sulfides, metal oxides, metal sulfates, and carbonate salts." J.A. 343a. Tests of decant water (wastewater samples after the solids have settled) revealed varying traces of 18 metals, including aluminum, chromium, copper, lead, and mercury. ER 334.[3]

The discharge would kill all fish in Lower Slate Lake and most other aquatic life. J.A. 197a, 374a. Whether aquatic life would be able to repopulate the lake after discharges ceased is uncertain. Two tests of the toxic effects of settled solids from the process wastewater on freshwater organisms showed clear

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[2] An appendix to the Environmental Impact Statement assumed that the volume would be about 148 gallons per minute, or 210,000 gallons per day. J.A. 206a. The record does not explain this discrepancy, but in any event there will be a substantial volume of process wastewater containing a high level of suspended solids.

[3] ER stands for the Excerpts of Record in the Ninth Circuit. SER stands for the Supplemental Excerpts of Record.

harm to biological productivity. In one test, only 5% of tested organisms survived in the "tailings sediments," far below the EPA's minimum allowable rate of 80%. J.A. 201a. In the other, organisms survived but showed "a statistically significant reduced emergence rate," below EPA's recommended endpoint. *Id.* The agencies saw "some uncertainty" in these results, but found that a reasonable worst-case assumption was that "the tailings would not support macroinvertebrates after closure...." J.A. 202a. To mitigate these toxic effects, the owner would be required to cap the lake bottom with four inches of native material when discharges cease. J.A. 309a. The administrative record contains no studies demonstrating the efficacy of this requirement. EPA, noting the uncertainty, concluded that "the weight of the evidence suggests that restoring and 'improving' the lake would take decades, not years." ER 429.

2. In the Clean Water Act, Congress established a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985...." 33 U.S.C. § 1251(a)(1).[4] Though the goal was not achieved, the measures enacted to pursue it remain in place.

To achieve this goal, Congress mandated the use of different technologies and standards for different sources of pollution. Section 301(b) requires EPA to adopt technology-based effluent limitations for existing pollution sources, to become increasingly strin-

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[4] "Navigable waters" is defined as "waters of the United States," 33 U.S.C. § 1362(7), and this brief uses the terms interchangeably.

gent over time. *See id.* § 1311(b); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 118 (1985); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 121 (1977). Section 306 requires the agency to adopt even more stringent effluent limitations—called standards of performance[5]—for new sources. 33 U.S.C. § 1316. Section 307 requires special effluent limitations for toxic pollutants. *Id.* § 1317(a). Section 304 requires EPA to publish "effluent limitation guidelines" providing information about technologies available to reduce and eliminate pollution from different sources and to comply with effluent limitations and performance standards. *Id.* § 1314(b)-(c).

The strictest standards are for new sources under section 306, because those sources present the best opportunity to achieve the Congressional goal of eliminating discharges. These national performance standards must reflect "the greatest degree of effluent reduction which [EPA] determines to be achievable through application of the best available demonstrated control technology...." *Id.* § 1316(a)(1). The Act directs EPA to adopt, "where practicable, a standard permitting no discharge of pollutants." *Id.* With these standards, Congress "intended to insure national uniformity and 'maximum feasible control of new sources.'" *Du Pont*, 430 U.S. at 138 (quoting S. Rep. No. 92-414, at 58 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3724). The Senate Report cited in *Du Pont* states that "this section ... is among the

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[5] The Act's definition of "effluent limitation" includes a standard of performance. *See* 33 U.S.C. §§ 1316(a)(1), 1362(11).

most significant in the legislation." S. Rep. No. 92-414, at 57, 1972 U.S.C.C.A.N. at 3723-24. The focus on new construction "is considered by the Committee to be the most effective and, in the long run, the least expensive approach to pollution control." *Id.* at 58, 1972 U.S.C.C.A.N. at 3724.

The Act's reliance on technology means that there are no limitations generally applicable to all pollution sources. Rather, limitations are different for each source category, depending on what control technologies are available and feasible. *See generally Du Pont*, 430 U.S. at 126-30.

The Act requires all sources to comply with any applicable effluent limitations under sections 301, 306, and 307. 33 U.S.C. §§ 1311(a), (b), (e), 1316(e), 1317(d). Section 402 of the Act directs EPA to establish the "National Pollutant Discharge Elimination System" (NPDES), requiring individual sources to obtain permits conditioned on compliance with these limitations. *Id.* § 1342. Section 404 authorizes the Army Corps of Engineers to issue permits for the discharge of one type of pollutant, dredged or fill material, subject to guidelines developed in conjunction with EPA. *Id.* § 1344. If a discharge is authorized by a valid fill-material permit under section 404, a section 402 permit is not required. *Id.* § 1342(a)(1) ("Except as provided in sections [318] and [404]...").

3. Recognizing the severe adverse effects of process wastewater discharges from ore beneficiating mills, EPA in 1975 identified "ore mining and dressing" as a category of sources of pollution under the Clean Water Act. 40 Fed. Reg. 51,748 (Nov. 6, 1975). Simultaneously, the agency adopted rules describing waste characteristics of various ore-processing mills,

identifying best technologies to control discharges, and setting limits for total suspended solids, pH, and various metals in discharges from existing sources. *See* 40 Fed. Reg. 51,722 (Nov. 6, 1975). Included were limitations for mills using the froth-flotation process for gold ores. *Id.* at 51,732 (adopting 40 C.F.R. § 440.22(a)(2)).

In 1982, EPA adopted a strict no-discharge standard, which remains in effect today, for new froth-flotation mills: "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process ... for the beneficiation of ... gold ... ores...." 40 C.F.R. § 440.104(b)(1); *see* 47 Fed. Reg. 54,598, 54,619 (Dec. 3, 1982). EPA explained the no-discharge standard for new facilities as follows:

> New facilities have the opportunity to implement the best and most efficient ore mining and milling processes and wastewater technologies. Accordingly, Congress directed EPA to consider the best demonstrated process changes and end-of-pipe treatment technologies capable of reducing pollution to the maximum extent feasible through a standard of performance which includes, "where practicable, a standard permitting no discharge of pollutants."

47 Fed. Reg. at 25,696 (quoting 33 U.S.C. § 1316(a)(1)). The agency noted that while some existing sources would require expensive retrofitting to achieve zero discharge, "[t]his concern does not apply to new sources," which can be designed to meet the standard. *Id.* at 25,697.

In both the 1975 and 1982 rules, EPA identified essentially the same best control technology: removal of solids in large settling ponds, usually called tailings ponds or impoundments, preceded by lime-precipitation. *See* 40 Fed. Reg. at 51,724 (subpart B(2)); 47 Fed. Reg. at 25,691. For new sources, the agency found that it was possible to achieve zero discharge by recycling water from tailings ponds back to the mill: "Raw wastewater discharged from a typical ore mill is usually routed to a settling pond for suspended solids and metals removal. In complete recycle, all treated water is routed back to the mill for reuse in the beneficiating process." 47 Fed. Reg. at 25,692.

EPA found that 46 out of 90 existing facilities were already achieving zero discharge through complete recycling. 47 Fed. Reg. at 54,602. The agency rejected arguments that zero discharge would be too expensive in wet or mountainous areas (like Alaska), finding that it had been successfully achieved in both. *Id.*

Addressing permitting requirements, EPA explained that the effluent limitations and performance standards "will be applied to individual ore mines and mills through NPDES permits issued by EPA ... under Section 402 of the Act." *Id.* at 54,606 (emphasis added). Notwithstanding the high solid content of process wastewater from these mills, *see* 47 Fed. Reg. at 25,685, EPA nowhere suggested that the Corps could permit these discharges as "fill material." Nor did EPA suggest that a mill could use a navigable lake as its settling pond, which would have directly contradicted the plain language of the rule prohibiting discharges to navigable waters.

4. Throughout most of the history of the Clean Water Act, the Corps' regulations explicitly precluded the use of a "fill material" permit to discharge process wastewater. From 1977 until 2002, the Corps' regulatory definition of "fill material" excluded "any pollutant discharged into the water primarily to dispose of waste, *as that activity is regulated under Section 402 of the Clean Water Act.*" J.A. 27a (quoting former 33 C.F.R. § 323.2(e); emphasis added by agencies); *see* 42 Fed. Reg. 37,122, 37,145 (July 19, 1977). EPA had a much broader definition of "fill material," encompassing discharges with the "effect" of fill, *see* J.A. 27a, but EPA does not issue section 404 permits.

To resolve confusion created by their different definitions of "fill material," the two agencies entered into a Memorandum of Agreement (MOA) in 1986. *See* 51 Fed. Reg. 8,871 (March 14, 1986). The MOA confirmed that "a pollutant ... will normally be considered by EPA and the Corps to be subject to section 402 if it is a discharge in liquid, semi-liquid, or suspended form," like the wastewater discharge from the Kensington mill. *Id.* at 8,872 ¶ B.5. The MOA cited "titanium mining wastes" as one example of such a discharge. *Id.* EPA had adopted performance standards for titanium mining wastes, including those from mills using flotation methods, in the same rulemaking that established the gold ore beneficiating rule in this case. *See* 47 Fed. Reg. at 54,614-15 (adopting 40 C.F.R. §§ 440.52(b) and 440.54(b)). Wastewater discharges from titanium mills, like those from gold mills, are high in suspended solids and metals, and require the use of settling ponds and pH adjustment as primary treatment technologies. *See* 47 Fed. Reg. at 25,687.

Under the MOA and the Corps' former regulations, the Corps did not grant section 404 permits for discharges subject to EPA effluent limitations. *See Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 445, 448 (4th Cir. 2003). Rather, EPA granted section 402 permits for these discharges, even if they met EPA's effect-based definition of "fill material." J.A. 83a-84a. This longstanding practice recognized that even if a discharge could be defined as "fill material," it was not eligible for a section 404 permit if it was subject to an effluent limitation.

Acting in accordance with the performance standards and longstanding regulatory policies of the agencies, Coeur Alaska applied for and obtained permits in 1997 to open the Kensington Mine using a "dry tailings facility" on land near Comet Beach. J.A. 165a, 177a-78a; ER 232-39, 252-62. This design "is a standard industry technology in use at other mines in Alaska." ER 450; *see also* SER 837 ¶¶ 10-11 (describing other mines using dry tailings facilities). It would not have involved any discharge of process wastewater into navigable waters. ER 235 ("Wastewater from the milling process would be recycled."). These permits were never challenged in court. Nevertheless, Coeur abandoned this option and never opened the mine under these permits. J.A. 161a.

5. In 2000, the Corps and EPA jointly proposed a new definition of "fill material"—finalized in 2002—intended to harmonize the agencies' differing definitions. Following EPA's approach, the new definition includes any material that "has the effect of ... [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii). In adopting the rule, the agencies

stated that it "is generally consistent with current agency practice and so it does not expand the types of discharges that will be covered under section 404." 67 Fed. Reg. 31,129, 31,133 (May 9, 2002); *see also id.* at 31,130, 31,132, 31,135; J.A. 46a, 47a-48a, 83a-84a.

The rule as proposed would have included an explicit exception for discharges subject to effluent limitations:

> The term *fill material* does not include discharges covered by proposed or final effluent limitations guidelines and standards under sections 301, 304 or section 306 of the Clean Water Act (see generally, 40 CFR part 401), or discharges covered by an NPDES permit issued under section 402 of the Clean Water Act.

65 Fed. Reg. 21,292, 21,299 (April 20, 2000). The agencies explained that this approach was consistent with the approach they had taken for many years under the 1986 MOA, and they specifically referenced paragraph B.5 of the MOA, providing that discharges "in liquid, semi-liquid, or suspended form" require section 402 permits. *Id.* at 21,297.

The agencies decided not to include the express exception in the final rule, but they stated explicitly, repeatedly, and consistently that they intended the rule to retain the same effect. They deleted the provision because of concerns that it was vague, that it inappropriately relied on "proposed" effluent limitations, and that it was unclear whether it was intended to cover future effluent limitations or only those then in effect. 67 Fed. Reg. at 31,135. The

agencies explained: "[A]lthough we have removed the language in question from the rule itself, we emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA." *Id.*; *see also id.* at 31,130, 31,133. Thus, "[i]f EPA has previously determined that a discharge is covered by an [effluent limitation guideline], that determination is not altered by today's rule." J.A. 46a; *see also* J.A. 47a-48a, 83a-84a.[6] They offered the same explanation to the public in a document posted on the Corps' website: "Although the effluent guideline provision in the proposed regulatory language was removed, because commenters found it confusing, the approach that would be followed with respect to effluent guidelines would remain the same as in the proposal." *Qs and As on the "Fill" Rule* at 2, *available at* www.usace.army.mil/cw/cecwo/reg/fillqas.pdf (last visited Nov. 4, 2008).

The agencies reiterated this point with reference to the precise circumstances of this case, where mine tailings meet the new definition of fill material and are also subject to effluent limitations. Responding to a comment expressing confusion over whether "mine tailings" would be subject to section 402 or 404, the agencies first stated the general principle that "slurry" and "tailings" are considered fill material under the new definition. J.A. 47a-48a. The

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[6] The Response to Comments document, J.A. 22a-127a, was part of the agencies' explanation for the final rule, cited in the Federal Register and incorporated into the administrative record. 67 Fed. Reg. at 31,131.

agencies immediately qualified that statement as follows:

> Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid. Moreover, NPDES permits issued pursuant to section 402 are intended to regulate process water and provide effluent limits that are protective of receiving water quality. This distinction provides the framework for today's rule.

J.A. 48a.

The agencies reiterated this point by reference to paragraph B.5. of the 1986 MOA, which provides that mining wastewater with suspended solids is subject to section 402. "As explained in the proposed rule's preamble (65 FR 21296), many of the discharges referred to in Section B.5. of the 1986 MOA are subject to effluent guidelines and NPDES permitting, and today's rule would not alter that existing scheme." J.A. 83a-84a. The Federal Register page cited in this sentence explained that discharges subject to effluent limitations and performance standards would continue to require section 402 permits and listed titanium mining wastes—which are functionally indistinguishable from gold mining wastes—as an example. 65 Fed. Reg. at 21,296. The agencies also stated that the 1986 MOA remains in effect, even after adoption of the new rule. J.A. 87a.

Denying that they had weakened the regulation to allow impermissible waste disposal, the agencies stated that "the suggestion that this rulemaking now

provides a legal basis for previously illegal activities is not the case—no discharges that were previously prohibited are now authorized as a result of this rulemaking." J.A. 32a. Process wastewater discharges from new gold ore beneficiation mills were, of course, "previously prohibited." *Id.*; *see* 40 C.F.R. § 440.104(b)(1).

6. In 2001, while the proposed rule-change was pending, Coeur Alaska submitted its application for a revised plan of operations for the Kensington Mine, which abandoned the dry tailings facility permitted in 1997 in favor of the less expensive option of discharging wastewater directly to Lower Slate Lake. J.A. 165a, 175a, 182a-83a. As the Corps later explained in its Record of Decision, "Lower Slate Lake will be used as the settling pond and disposal site for the tailings generated from the mill." J.A. 360a.

Two years after the 2002 rule-change, EPA and the Corps decided to consider Coeur's request for a permit under section 404 rather than enforce EPA's no-discharge performance standard. Despite the clear statements published in the Federal Register by the heads of both agencies with the promulgation of the final rule that EPA effluent limitations would govern such situations, lower-ranking officials reversed course in an internal agency memo (the "Regas memo") that was never published or made available for public comment. J.A. 141a-49a. The memo purported to interpret the 2002 fill rule but disregarded the agencies' statements in adopting that rule that they intended to continue their practice of requiring section 402 permits for discharges subject to effluent limitations. J.A. 143a-45a. Ignoring those statements and section 306's prohibition of

all discharges in violation of performance standards, the memo concluded that the discharge of "tailings" from the Kensington Mine could be permitted as a discharge of "fill material" under section 404 and was exempt from otherwise applicable effluent limitations. *Id.*

In considering Coeur's permit application, the federal agencies disagreed among themselves as to which alternative was environmentally preferable. While the Corps concluded that lake disposal was the best option, J.A. 366a, EPA argued that the dry tailings alternative permitted in 1997 was preferable. J.A. 295a, 298a-300a. EPA noted that the dry tailings facility "is the only alternative that avoids the habitat loss and the loss of natural ecological functions in Lower Slate Lake during mine operations." J.A. 299a. While the Corps focused on the acreage of forested wetlands lost with the dry tailings facility, J.A. 364a-66a, EPA focused on the quality of habitat: "EPA believes that forested wetlands are far more plentiful, and of far less ecological value at this location, than lacustrine and palustrine emergent wetlands, which are rare and ecologically important at this location." ER 455; *see also* J.A. 204a ("Lower Slate Lake provides high values for fish habitat [and] high values for wildlife habitat"). The Forest Service found the alternatives equal. J.A. 224a-25a.

Importantly, both the Corps and EPA agreed that discharges to Lower Slate Lake were not exempt from Clean Water Act compliance on the ground that the lake could be deemed a "waste treatment system," which would exclude it from "waters of the United States" under the Act. *See* J.A. 145a-146a; 40 C.F.R. § 122.2 (definition of "Waters of the United

States").[7] Recognizing that the lake is a navigable water body under the Act, the Corps issued the section 404 permit on June 17, 2005. J.A. 266a-86a.

7. Respondents Southeast Alaska Conservation Council, et al., (collectively "SEACC") promptly filed this action, alleging that the permit violates sections 301(e) and 306(e) of the Clean Water Act, 33 U.S.C. §§ 1311(e), 1316(e), because it fails to comply with the no-discharge performance standard for new froth-flotation mills. *See* 40 C.F.R. § 440.104(b)(1); J.A. 473a-75a. SEACC alleged in the alternative that, if the 2002 revised definition of "fill material" were interpreted to allow the direct discharge into Lower Slate Lake, the rule itself would be arbitrary, capricious, and contrary to the Act. J.A. 475a, ¶ 72.

The district court entered summary judgment for the Corps. J.A. 478a-96a. The premise of the court's holding was that the new "fill material" definition includes mine tailings. The court dismissed sections 301 and 306 without analysis and did not address the agencies' intent regarding the relationship between effluent limitations and the new fill rule. J.A. 488a n.35, 490a-95a.

The Ninth Circuit reversed. The court began with the language of the Act, as required by *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984). J.A. 527a. The court concluded that the plain language of

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[7] The Alaska Department of Environmental Conservation, by contrast, was able to certify the discharge as consistent with state water-quality standards only by deciding that the lake would become a "treatment work" under state law, exempting it from the standards. J.A. 258a.

sections 301(a), 301(e), and 306(e) prohibits any discharge that does not comply with applicable effluent limitations and performance standards. J.A. 531a. Addressing Petitioners' arguments that sections 402 and 404 of the Act implied an exception to these provisions, the court applied this Court's well-established rule that "[e]xceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." J.A. 532a (quoting *United States v. Rutherford*, 442 U.S. 544, 552 (1979)). The court reviewed each of the Corps' and Petitioners' arguments for an implied exception and found they did not meet this standard. J.A. 532a-35a.

Although the court found the language of the Act sufficient to decide the case, it also considered the agencies' intent when they adopted both relevant regulations—the performance standard and the definition of fill material. The court reviewed the regulatory history and concluded that the new definition of fill material was not intended to create an exception to effluent limitations. J.A. 535a-46a. "The agencies could not have been more clear in articulating that this would be their preferred approach." J.A. 546a.

The court also concluded that if the agencies intended to repeal or create an exception to the long-standing regulations governing froth-flotation mills, they were "obligated to supply a reasoned analysis for the change." J.A. 547a (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). The court found that the agencies had said just the opposite: that they in-

tended *no* change in their past practice. If the rule's effect differed from the agencies' stated intent, the rule would be arbitrary and capricious. J.A. 547a-48a.

Finally, in addressing whether to apply the "fill material" definition or the performance standard for froth-flotation mills to the discharge, the court applied the familiar principle that the more specific rule—here, the performance standard—governs. J.A. 548a.

The Ninth Circuit denied a petition for rehearing en banc, with no active judge requesting a vote on the petition. J.A. 552a-53a.

Shortly after the appellate court's decision, Coeur and SEACC entered into discussions mediated by the mayor of Juneau for the purpose of finding a tailings disposal site that would comply with the Clean Water Act. As a result, Coeur agreed to pursue permits for a facility on the upland site authorized in 1997. The new proposal would deposit the tailings in "paste" form and would not discharge process wastewater into navigable waters. *See* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf. Shortly after submitting its opening brief in this Court, as the agencies neared the end of their review process, Coeur abruptly withdrew its application. *See* Kate Golden, *EPA puzzled by Coeur Alaska pullout*, Juneau Empire, Sept. 25, 2008, at 1, *available at* http://www.juneauempire.com/stories/092508/sta_336770591.shtml.

SUMMARY OF ARGUMENT

The dispute in this case—whether a process wastewater discharge meeting the agencies' definition of "fill material" is exempt from EPA performance standards—turns on the interplay between sections 306 and 404 of the Clean Water Act. Section 306(e) declares categorically that "it shall be unlawful" to operate any new source in violation of any applicable performance standard, and lists no exceptions. 33 U.S.C. § 1316(e). Section 404(a) provides that the Corps "may" issue permits for the discharge of "fill material," but does not exempt the Corps from compliance with other provisions of law in exercising this discretionary authority. *Id.* § 1344(a). In this case, the process wastewater discharge from the Kensington Mine's beneficiation mill is prohibited by a new source performance standard adopted by EPA, but it also meets the agencies' new definition of "fill material," because its suspended solids will settle and raise the bottom elevation of Lower Slate Lake.

To resolve this question, the Court follows the two-step approach articulated in *Chevron*, 467 U.S. at 842-43, focusing first on the language of the statute and second, if necessary, on the agency's interpretation of any statutory ambiguities or gaps that Congress intended the agency to fill.

Congress has spoken directly to the question presented. Section 306(e) of the Clean Water Act declares in plain terms a categorical prohibition, unambiguously applicable to the Kensington mill. *See* 33 U.S.C. § 1316(e). Section 404 does not set forth any exceptions to the prohibition, but merely

authorizes the Corps to issue permits for fill-material discharges. *See id.* § 1344. Section 404 explicitly allows EPA to take enforcement actions for violations of section 306, *id.* §§ 1344(n), 1319(a)(3), (b), (c)(1)-(3), (d), (g)(1), and does not shield permittees from enforcement of section 306. *Id.* § 1344(p).

Petitioners and the Corps urge the Court to find an implied exception to section 306(e) for any discharge that meets the agencies' new definition of "fill material," but the Court will do so only if applying the plain terms of the statute would cause "'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *Rutherford*, 442 U.S. at 552 (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941)). Applying the plain language of section 306(e) produces results that are neither absurd nor at variance with the Act's purposes. To the contrary, it much better serves the explicit Congressional goal of eliminating all discharges of pollutants to navigable waters. *See* 33 U.S.C. § 1251(a)(1).

This result does not conflict with section 404. That section is merely a grant of discretionary authority to the Corps. *See id.* § 1344(a). In exercising this authority, the Corps must respect other applicable laws, including section 306(e). Because section 404 makes no provision for the Corps to incorporate applicable section 306 performance standards in its permits, discharges from sources subject to performance standards must be permitted, if at all, under section 402.

The legislative history of the Act supports this plain-language interpretation. The Act designates the NPDES permit program administered by EPA

under section 402 as the successor to the Corps' former permit program under the Refuse Act, 33 U.S.C. § 407. *See id.* § 1342(a)(5). EPA and the Corps had required over 20,000 industrial sources to apply for permits under that program, among them Reserve Mining Company's iron-ore beneficiation mill, which was then discharging its process wastewater as a tailings slurry into Lake Superior. Congress specifically discussed this case in its deliberations, revealing an intent that industrial sources like Reserve Mining would be subject to permits under section 402, not 404.

Because the statute is clear, there is no need to consider the agency's interpretation under *Chevron* step two. However, even if the Act were ambiguous, the agencies directly addressed this question when they adopted the 2002 fill rule and stated in no uncertain terms that, in changing the definition of "fill material," they did not intend to authorize the Corps to issue permits for discharges subject to effluent limitations. Such an authorization would have been a reversal of longstanding practice, which they made clear they did not intend. This interpretation, adopted by the heads of the agencies and published in the Federal Register, is reasonable and entitled to deference.

The subsequent reinterpretation of the 2002 fill rule for the Kensington Mine is not entitled to deference. The Regas memo was written by subordinate agency officials and neither published nor made available for public comment. It purports to construe the 2002 rule but ignores the repeated statements in the Federal Register and the rulemaking record that the agencies did not intend to change their long-

standing practice of applying effluent limitations—specifically including those applicable to mine tailings—through section 402 permits. The agencies' new position would effectively nullify EPA's performance standard, again without explanation. Thus, even if the Corps' position in this case could be squared with the text of the regulations at issue—which it cannot—it would not be a construction worthy of deference.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE CLEAN WATER ACT, THE CORPS LACKS AUTHORITY TO PERMIT WASTEWATER DISCHARGES FROM SOURCES SUBJECT TO EPA PERFORMANCE STANDARDS.

To determine whether the Clean Water Act exempts discharges defined as "fill material" from section 306(e), one must begin with the language of the statute. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter...." *Chevron*, 467 U.S. at 842. The Court uses "traditional tools of statutory construction" in making this determination. *Id.* at 843 n.9.

A. Section 306(e) Prohibits Any Wastewater Discharge from the Kensington Mill.

Section 306(e) of the Act provides in its entirety:

> After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

33 U.S.C. § 1316(e). Because 306(e) contains no exceptions—a conspicuous absence in a statute otherwise replete with highly detailed exceptions—this Court has observed that performance standards are "absolute prohibitions" and that "a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.'" *Du Pont,* 430 U.S. at 138 (quoting S. Rep. No. 92-414, at 58, 1972 U.S.C.C.A.N. at 3724).

The no-discharge standard at 40 C.F.R. § 440.104(b)(1), adopted under section 306, unambiguously applies to the new mill at the Kensington Mine. The regulation's applicability provision leaves no room for interpretation: "The provisions of this subpart J are applicable to discharges from ... Mills that use the froth-flotation process ... for the beneficiation of ... gold ... ores...." 40 C.F.R. § 440.100(a)(2). The standard itself further verifies that it applies to the Kensington mill by prohibiting discharges "from mills that use the froth-flotation process ... for the beneficiation of ... gold ... ores...." *Id.* § 440.104(b)(1). EPA confirmed that "the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the [Kensington] project (40 CFR 440.104)." J.A. 291a.

Invoking language limiting section 306(e) to "any standard of performance applicable to such source,"

33 U.S.C. § 1316(e), the Corps implausibly denies that the performance standard for new froth-flotation mills is "applicable" to the Kensington mill. *See* Fed. Br. at 25. The agency reaches this conclusion by misreading the quoted language, arguing that "[t]o determine whether a performance standard is applicable to a source, one must again refer back to the Act as a whole and, in particular, to Section 404 when the discharge of fill material is at issue." *Id.* However, neither "the Act as a whole" nor section 404 addresses the sources to which section 306 standards are applicable. To determine whether a "standard of performance" is "applicable" to a "source," 33 U.S.C. § 1316(e), one must examine the standard and the source. Here, the standard (40 C.F.R. § 440.104(b)(1)) is plainly applicable to the source (the Kensington mill). *See also* 33 U.S.C. § 1316(a)(1), (a)(3) (defining "standard of performance" and "source").

The Corps jumps the tracks by focusing on whether the mill's wastewater discharge meets the definition of "fill material." But that is irrelevant under the plain language of section 306(e), which says nothing about the composition of the discharge. It refers only to standards and sources.

The Corps also argues that section 301(e) does not require discharges meeting the definition of "fill material" to comply with section 301 effluent limitations, but the agency misinterprets the phrase "in accordance with the provisions of this chapter." Fed.

Br. at 25 (quoting 33 U.S.C. § 1311(e)).[8] Section 301(e) provides:

> Effluent limitations established pursuant to this section or section [302] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

33 U.S.C. § 1311(e). Because the Corps infers an exception for fill material under section 404, the agency concludes that the "provisions of this chapter" do not require compliance with otherwise applicable effluent limitations. Section 301(e) precludes such an implied exception by requiring that effluent limitations be applied to "*all* point sources ... in accordance with the provisions of this chapter." *Id.* (emphasis added). The Corps reads the section as if it said "*except* in accordance with the provisions of this chapter," but Congress did not say "except." The section is, literally, a requirement that any applicable effluent limitations be applied to *all* point sources in accordance with the Act.

B. There Is No Conflict Between Section 306(c) and Section 404.

Petitioners mistakenly argue that sections 306(e) and 404 are in conflict, requiring resort to canons of statutory construction to determine which controls

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[8] In addition to the section 306 performance standard, EPA has adopted effluent limitations under section 301 for froth-flotation mills. 40 C.F.R. § 440.102(b). The latter are less strict, but the discharge authorized by the Corps here would comply with neither.

the discharge in this case. *See* Coeur Br. at 13, 27-28. There is no conflict between the two sections. While section 306(e) is a categorical prohibition, *see* 33 U.S.C. § 1316(e) ("it shall be unlawful"), section 404 is a permissive grant of discretionary authority that does not exempt fill material discharges from compliance with other applicable legal requirements. *See id.* § 1344(a) ("The Secretary may issue permits...").

Section 306(e) is only one of many legal requirements the Corps must respect in exercising its discretionary authority under section 404. The Corps and EPA have long recognized that section 404 does not exempt fill-material discharges from other requirements of law. The first sentence of the 404(b) guidelines states, "Because other laws may apply to particular discharges..., a discharge complying with the requirement of these Guidelines will not automatically receive a permit." 40 C.F.R. § 230.10. The agency's regulations identify over a dozen other statutes that may limit the agency's discretion. *See id.* § 230.10(a)(4)-(5), (b)(3)-(4); 33 C.F.R. § 320.3. In some cases, these laws may prohibit the Corps from issuing a permit. *See, e.g.*, 40 C.F.R. § 230.10(b)(3) (prohibiting discharges that would jeopardize listed species under Endangered Species Act).

Just as the Corps must comply with other applicable laws in issuing or denying section 404 permits, the agency must also refrain from authorizing discharges that would violate section 306(e). Section 404's enforcement provision—subsection (n)—makes this particularly clear: "Nothing in this section shall be construed to limit the authority of the [EPA] Administrator to take action pursuant to section [309]."

33 U.S.C. § 1344(n). Section 309, in turn, authorizes EPA to take enforcement actions for violations of various provisions of the Act, including, explicitly, section 306. *Id.* § 1319(a)(3), (b), (c)(1)-(3), (d), (g)(1). This enforcement authority is in addition to, and separate from, authority to enforce conditions in permits issued under sections 402 and 404. *See id.*; *see also id.* § 1344(s). Moreover, while compliance with a section 404 permit shields the permittee from actions enforcing sections 301 and 307, it does *not* provide a shield for violators of section 306. *See id.* § 1344(p). In contrast, section 402 provides that NPDES permittees are deemed to comply with section 306. *See id.* § 1342(k).

In short, nothing in section 404 exempts fill material discharges from compliance with section 306, limits EPA's authority to bring actions for violations of section 306, or protects permittees from those actions. These features reveal unambiguously that Congress did not intend section 404 to authorize the Corps to permit discharges that violate performance standards under section 306(e).

There is thus no conflict between the two sections. Absent a conflict, there is no need to resort to the canon of construction, urged by Petitioners, that specific provisions control over general ones. *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002) (holding that the rule does not apply when there is no conflict).[9]

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[9] Even if the specific/general canon applied, section 306 is more specific than section 404 regarding the issues of greatest concern to Congress. Although section 404 is more specific as to

(footnote continued...)

The absence of conflict distinguishes this case from *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007). That case reconciled two mandatory statutes directing the agency to take inconsistent actions, *id.* at 2531-32, by deferring to the agency's reasonable interpretation of the conflicting provisions as expressed in regulations. *Id.* at 2534. The Court expressly distinguished a situation where Congress enacted discretionary and mandatory provisions, holding that the discretionary action was subject to the mandatory one, *id.* at 2536-37, and that there was "no clear repugnancy" between them. *Id.* at 2537 n.9. Similarly, the discretionary authority here (section 404) must be exercised in compliance with the mandatory (section 306(e)).

C. Section 306(e) Has No Implied Exception for Fill Material.

Petitioners and the Corps argue, in effect, that various provisions of the Act and its structure as a

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the form of discharges covered (dredged and fill material), section 306 is much more specific as to the sources regulated and standards applied. Section 404 applies to discharges from any "point source," *see* 33 U.S.C. §§ 1344(a), 1362(6), (12), a broadly defined term, *id.* § 1362(14), while section 306(e) applies only to "new sources," a narrow subset of point sources. *Id.* § 1316(a)(2), (3). Section 306 also requires detailed standards specific to each industry source category, while section 404 requires only one set of general guidelines applicable to all discharges. *Compare id.* § 1316(b) *with id.* § 1344(b). Congress attached high importance to new sources. *See supra* pp. 6-7. Were there actually a conflict between sections 306(e) and 404, Congress has expressed its intent that the more specific provisions for new sources under section 306 control.

whole create an implied exception to the plain language of section 306(c), and to effluent limitations adopted under section 301, whenever a discharge meets the agencies' definition of "fill material." This argument cannot pass muster.

To begin with, Petitioners' construction is highly unlikely given the Act's purposes. It would hinge the entire regulatory structure on one term—"fill material"—that Congress did not define and that was not Congress' central concern. Congressional deliberations focused overwhelmingly on industrial and municipal waste discharges.[10] The Act seeks to eliminate these discharges primarily through a system of increasingly strict, technology-based effluent limitations for industrial source categories that must prohibit any discharges where practicable. *See* 33 U.S.C. §§ 1251(a)(1), 1311(b)(2)(A), 1316(a)(1). To allow a new industrial source to escape these requirements because its wastewater contains a high level of one pollutant—suspended solids—would be contrary to this explicit legislative purpose and particularly anomalous given Congress' explicit command that EPA regulate suspended solids. *See* 33 U.S.C. § 1314(a)(4). It would reward the worst industrial discharges by exempting them from the very mechanism Congress adopted to achieve the national goal. The use of a navigable lake as a wastewater

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[10] The Clean Water Act was enacted in the wake of highly publicized problems such as the Cuyahoga River fire, massive fish kills, and contaminated drinking water supplies, all caused by industrial pollution. *See* Robert W. Adler, Jessica C. Landman, & Diane M. Cameron, *The Clean Water Act 20 Years Later* 5-6 (1993).

settling pond is also contrary to the guiding principle that "[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable." S. Rep. No. 92-414, at 7, 1972 U.S.C.C.A.N. at 3674. The Act's language and structure do not support this unlikely outcome.

1. Courts Should Rarely Infer Exceptions.

"Exceptions to clearly delineated statutes will be implied only where essential to prevent absurd results or consequences obviously at variance with the policy of the enactment as a whole." *Rutherford*, 442 U.S. at 552 (quotation marks omitted). "Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied." *Id.* at 555. "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." *Id.* at 559, *quoted in United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001).

The presumption against implied exceptions has particular force in a statute that, like the Clean Water Act, contains highly detailed, explicit exceptions. *See Du Pont*, 430 U.S. at 138 (reasoning that explicit exception in section 301(c) reinforces conclusion that Congress intended no exceptions to section 306(e)); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (quoting *Andrus v. Glover Constr.*

Co., 446 U.S. 608, 616-17 (1980)); *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 489-90 (declining to find implied exception where statute provided express exception).

Requiring a new source to comply with applicable performance standards as provided in section 306(e), even if its wastewater meets a broad definition of "fill material," is neither an "absurd result" nor "obviously at variance with the policy of the enactment as a whole." *Rutherford*, 442 U.S. at 552. To the contrary, it is the result that best achieves the Act's purposes. Exempting new sources from performance standards, which must prohibit any discharge "where practicable," 33 U.S.C. § 1316(a)(1), would move in the opposite direction of the express Congressional goal of eliminating all discharges. *Id.* § 1251(a)(1).

2. Sections 306 and 404 Reflect a Deliberate Choice by Congress Not to Include the Exception Sought by the Corps.

Sections 306 and 404, like the rest of the Act, include specific, detailed exceptions where Congress intended them. The absence of an express exception from section 306 for discharges meeting the agencies' definition of "fill material" strongly suggests that Congress did not intend any such exception.

While nothing in section 404 exempts fill-material discharges from section 306(e), section 404 does contain other specific exceptions, and exceptions to the exceptions. *See* 33 U.S.C. §§ 1344(f), (r). Similarly, while section 306 contains no exception for fill material, it does exempt new sources from stricter stan-

dards for a ten-year period following completion of construction. *See id.* § 1316(d).

Had Congress intended section 404 permits to exempt new sources from compliance with performance standards, it could have used a variety of devices employed elsewhere in the Act to convey that intent. It could, for example, have qualified section 306(e) with the preface, "Except as provided in section 404...." That is exactly what the Act provides in sections 301(a) and 402(a)(1), but *not* in 306(e). *Compare id.* §§ 1311(a), 1342(a)(1) *with id.* § 1316(e). Congress used the same formulation repeatedly throughout the Act, including in section 404(f). *See, e.g., id.* §§ 1344(f), 1311(j)(1)(A), (*l*), 1322(f), (n)(6)(A), 1365(a).

Another way to provide the exemption sought by Petitioners in this case would have been to preface section 404 with the phrase, "Notwithstanding section 306...." This type of formulation also appears throughout the Act, including in section 306(d), but *not* in section 404. *Compare id.* §§ 1316(d), 1311(f), 1345(a), 1364(a), 1371(d) *with id.* § 1344(a).

3. Sections 301 and 306 Have Independent Effect and Do Not Depend on Other Provisions to Trigger Them.

Section 306, like the effluent-limitation provisions of section 301, applies directly to discharges and is enforceable independent of any other provisions in the Clean Water Act. Petitioners repeatedly mischaracterize the Act by asserting that EPA adopts these limitations "under" or "as part of" the 402 permit program, Coeur Br. at 3, 21, and that they apply only "where other provisions of the CWA make them

applicable." State Br. at 21. Several provisions of the Act, including sections 306 and 301 themselves, reveal that this view is incorrect. This Court has drawn the same conclusion. *Du Pont*, 430 U.S. at 133 n.24 ("a number of provisions of the Act seem to assume that § 301 effluent limitations have some existence apart from § 402 permits").

The Act's central prohibition against unlawful discharges demonstrates that sections 301 and 306 have independent effect. Section 301(a) provides: "Except as in compliance with *this section* and sections [30 , *306*, 307, 318, 402, and 404], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). If Congress intended the standards and limitations of sections 301, 302, 306, and 307 to apply only to the extent they were included as conditions in permits under sections 402 or 404, section 301(a) would simply say, "Except as provided in sections 402 or 404...." The inclusion of the other five provisions would be pure surplusage. That Congress enumerated all of these provisions demonstrates that each was intended to have independent effect.

Moreover, sections 306 and 301 on their face require compliance with their limitations independent of any permit conditions. *See, e.g.*, 33 U.S.C. §§ 1316(e) (prohibiting discharges in violation of performance standards), 1311(b)(2)(E) (requiring, without reference to permits, "compliance with effluent limitations ... which ... shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator"), 1311(e) (requiring application of effluent limitations to "all point sources"),

1311(j)(3)(B), (n)(7) (requiring, without reference to permits, that discharges must comply with effluent limitations when requests to modify limitations are denied). EPA is authorized, under specified circumstances, to *modify* these requirements in permits. *Id.* § 1311(c), (h), (k), (m), (p)(1). The contrast in the wording of these subsections shows that the effluent limitations are applicable on their own but that EPA may modify them in a permit.

That sections 301 and 306 are independently enforceable underscores the point. EPA or a citizen can bring an action to enforce sections 301 or 306, or, *separately*, to enforce permit conditions. *See* 33 U.S.C. §§ 1319(a)(3), (b), (c)(1)-(3), (d), (g)(1), 1365(a)(1), (f). Section 404 expressly preserves EPA's authority to bring enforcement actions under these provisions. *Id.* § 1344(n). The Act thus explicitly gives enforceable legal effect to effluent limitations under sections 301 and 306 independent of any permit.

The Act's structure further supports the independent applicability of sections 301 and 306. Those sections are included in Subchapter III, "Standards and Enforcement." That subchapter includes section 301(a)'s general prohibition against discharges, *id.* § 1311(a), all the Act's effluent limitations and water-quality standards, *id.* §§ 1311-17, and its enforcement provisions. *Id.* § 1319. Sections 402 and 404 are included separately in Subchapter IV, "Permits and Licenses." Had Congress intended effluent limitations to be dependent entirely on permits, a more logical organization would have been to group sections 306 and the effluent limitation provisions of

section 301 with sections 402 and 404, rather than with the prohibition and enforcement provisions.

4. Neither Section 402 nor Section 307 Establishes an Implied Exception to Section 306(e).

Petitioners and the Corps argue that section 402 implicitly exempts any discharge meeting the definition of "fill material" from the prohibition of section 306(e). They rely initially on section 402's preface, "Except as provided in sections [318 and 404]...." 33 U.S.C. § 1342(a)(1).

The preface does not create an exception to *section 306*. It means that if a discharge is authorized in a section 404 permit, it does not also need a section 402 permit, but it says nothing about whether the Corps may lawfully grant a section 404 permit in any particular case. Indeed, that Congress used this preface in section 402 but *not* 306 is strong evidence that Congress did not intend it to apply to section 306.

Petitioners and the Corps rely heavily on the fact that permits under section 402, but not 404, must include conditions requiring compliance with effluent limitations under sections 306 and 301. *Compare id. with id.* § 1344. They then leap to the conclusion that section 404 authorizes discharges otherwise prohibited by sections 306 and 301. The Ninth Circuit aptly noted that they were relying on a negative inference to find an implied exception, J.A. 531a, and found a much simpler explanation for the difference between sections 402 and 404: Congress did not intend the Corps to issue "fill material" permits for discharges subject to effluent limitations. J.A. 533a.

This interpretation gives full meaning to all the sections of the Act without resort to implied exceptions from the plain language of sections 306 and 301.

All parties agree that Congress did not authorize the Corps to issue section 404 permits incorporating effluent limitations under sections 306 or 301. Section 404 permits must comply with the 404(b) guidelines and with effluent standards for toxic pollutants under section 307. *Id.* § 1344(b), (f), (h)(1)(A)(i), (r); *see also id.* § 1317(a)(5). In contrast, section 402 permits must include conditions requiring compliance with effluent limitations under sections 301, 306, 307, and others. *See id.* § 1342(a)(1). Similarly, Congress provided a shield from enforcement under section 306 for discharges complying with a section 402 permit, but not with a section 404 permit. *Compare id.* § 1342(k) *with id.* § 1344(p). As Petitioners note, the Court must presume Congress acted purposely in writing the two provisions differently. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006).

Petitioners and the Corps carry the argument too far, however, when they infer that Congress intended an exception from section 306 and 301 effluent limitations for any discharge meeting a broad definition of "fill material." Sections 306 and 301 unambiguously prohibit discharges in violation of the effluent limitations they require, and only section 402 authorizes the issuance of permits that can carry out that command. Thus, the statutory text and structure compel the conclusion that the reason for the different language in sections 402 and 404 is to ensure that all point sources subject to effluent limitations under sections 306 or 301 be permitted, if at

all, under section 402, not section 404. This interpretation is far preferable, because it honors the plain language of sections 306 and 301 and the presumption against implied exceptions.[11]

5. The Ninth Circuit Correctly Interpreted Section 301(a).

In a sideshow, the Corps and Petitioners take issue with the Ninth Circuit's conclusion that the use of the connector "and" in section 301(a) signifies Congress' intent that discharges must comply with each applicable provision. *See* 33 U.S.C. § 1311(a); J.A. 531a. Mischaracterizing the opinion, they assert that this interpretation would require compliance with inapplicable provisions.

The Ninth Circuit recognized that discharges are subject only to "applicable" provisions. J.A. 531a. For example, an old source is not subject to section 306, which by its plain terms applies only to new sources. *See* 33 U.S.C. § 1316. Similarly, a person with a valid section 404 permit need not obtain a section 402 permit for the same discharge, because section 402 applies only "[e]xcept as provided in sections [318 and 404]...." *Id.* § 1342(a)(1). The Ninth Circuit did not suggest otherwise.

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[11] The difference between the language of section 404 and that of section 318, 33 U.S.C. § 1328, on which the State of Alaska relies, *see* State Br. at 28, reinforces the conclusion that section 404 permits cannot be issued for sources subject to effluent limitations under sections 301 and 306. Section 318 specifically provides for the incorporation of such limits into permits, *see id.* § 1328(b), while section 404 does not.

This interpretation is entirely consistent with the plain language of section 301(a) and the use of "and" as a connector. If one of the listed sections has no application to a particular discharge, then the discharge cannot be in violation of it. In that sense, the discharge is literally "in compliance" with that provision. *Id.* § 1311(a).

Moreover, Coeur cannot be correct in suggesting that "and" actually means "or." *See* Coeur Br. at 25. As the Corps recognizes, this would eviscerate the statute. *See* Fed. Br. at 25 n.6. However, the Corps is equally incorrect in suggesting that section 301(a) simply requires compliance with "the overall body of law." *Id.* at 24. The statute enumerates seven separate provisions, a plain statement that every discharge must comply with every applicable provision. 33 U.S.C. § 1311(a). Indeed, the State of Alaska concedes this point. State Br. at 31.

None of this, however, resolves the question in this case. While section 301(a) clearly evinces a Congressional intent that each of the enumerated provisions has independent effect, it does not, by itself, answer whether a particular section applies to a particular source or discharge. To do that, one must consult the provision in question. As demonstrated above, section 306(e) applies to and prohibits the discharge at issue here.

D. The Language and History of the Act Demonstrate That Congress Intended Wastewater Discharges from Ore Beneficiation Mills to Be Governed by Section 402 Permits.

Section 402(a)(5) of the Act further demonstrates Congress' intent that process wastewater discharges from industrial sources—including, specifically, ore beneficiation mills—were to be regulated under section 402. Section 402(a)(5) terminated the Corps' authority to issue permits under the Refuse Act, 33 U.S.C. § 407, and provided that pending Refuse Act permit applications be deemed applications for section 402 permits. 33 U.S.C. § 1342(a)(5); *see also id.* § 1342(k) (transition provisions for Refuse Act enforcement).

When the Clean Water Act was enacted, the Corps had recently established a comprehensive permit program under the Refuse Act, also known as section 13 of the Rivers and Harbors Act. *See* 36 Fed. Reg. 6564 (April 7, 1971). Although the Refuse Act dated from the 19th Century, the Corps historically had construed it as limited to discharges affecting navigation and even then only rarely invoked it. In response to severe and worsening water pollution, the president in 1970 issued an executive order requiring adoption of a Refuse Act permit program. *See United States v. Pa.. Indus. Chem. Corp.*, 411 U.S. 655, 659 n.9, 672 (1973). The resulting 1971 regulations for the first time encompassed "all direct and indirect discharges or deposits" into navigable waters. 36 Fed. Reg. at 6565 (§ 209.131(d)(1)).

In adopting these regulations, the Corps drew a distinction between "discharges or deposits," which

would require permits under the Refuse Act, *see id.*, and "work" or "structures" in navigable waters, which would require permits under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (a predecessor to the section 404 permit program). *See* 33 Fed. Reg. 18,670, 18,671 (Dec. 18, 1968) (adopting § 209.120, "Permits for work in navigable waters"); 36 Fed. Reg. at 6567 (adopting § 209.131(f), explaining difference in programs); *see also Pa.. Indus. Chem. Corp.*, 411 U.S. at 672 (describing section 10 regulations as "dealing with construction and excavation in navigable waters").[12]

The Refuse Act permit program adopted in 1971 was the template for section 402 of the Clean Water Act, a fact discussed repeatedly in the legislative history and formalized in section 402(a)(5). The Senate Report noted that Congress had made a conscious "effort to weave the [Refuse Act] permit program into this legislation." S. Rep. No. 92-414, at 71, 1972 U.S.C.C.A.N. at 3737. While deliberations over the Act were underway, a district court declared the Refuse Act regulations unlawful. *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971). The Administrator of EPA wrote in a letter published in the Congressional Record that "[t]he enrolled bill formalizes" the Refuse Act permit program and "affords EPA the opportu-

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[12] This Court had previously held that an industrial waste discharge containing solids could be considered both an "obstruction" under section 10 and a "discharge" under the Refuse Act. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 485 (1960). However, in its later permitting regulations, the Corps drew the line described above between permits under the two provisions.

nity to extricate the Permit Program from its current judicial morass." 118 Cong. Rec. 36,780 (1972). Representative Clark remarked:

> At the present time, [the Refuse Act permit] program has broken down completely and no permits are being issued. Over 20,000 applications have been filed, but all discharges could be considered in technical violation of the law, because they have no permits. Section 402 transfers the program from the corps [sic] to EPA....

Id. at 33,765.

Members of Congress discussed one of these 20,000 applications specifically during deliberations over the Clean Water Act's final passage: the discharge from Reserve Mining Company's iron-ore beneficiation plant into Lake Superior. The discharge was a slurry containing 67,000 tons per day of suspended tailings that settled on the lake bottom. *See Reserve Mining Co. v. EPA*, 514 F.2d 492, 500 (8th Cir. 1975). It contained asbestos, posing a threat to the drinking-water supply of Duluth, Minnesota, among other health concerns. *Id.* at 501. Although Reserve held a section 10 permit under the Rivers and Harbors Act addressing impediments to navigation, *id.* at 530, it had to apply for a Refuse Act permit under the Corps' new program in 1971. *Id.* at 531. The permit was not granted before passage of the Clean Water Act, *id.*, and in February 1972 EPA sued to abate the ongoing harm. *Id.* at 501. EPA ultimately succeeded in forcing Reserve to discontinue discharges into the lake and develop an on-land tailings disposal site. *Id.* at 537-38.

The situation was brought to Congress' attention as a result of some members' concerns that passage of the Clean Water Act not impede EPA's lawsuit—concerns that led to inclusion of an uncodified savings provision to ensure the Reserve Mining case and others would continue. *See id.* at 531 n.75; 118 Cong. Rec. 33,705-06, 33,713 (1972) (statements of Sens. Griffin, Muskie and Hart). In light of Congress' specific attention to the Reserve Mining situation, its decision to transfer permitting authority for such discharges from the Corps under the Refuse Act to EPA under section 402(a) cannot be squared with Petitioners' view that such discharges fall outside EPA's authority. Indeed, Reserve's application to discharge the tailings slurry from its ore beneficiation mill was transferred to EPA under section 402(a), not to the Corps under section 404. *See Reserve Mining*, 514 F.2d at 531; 33 U.S.C. § 1342(a)(5).

The State of Alaska thus draws exactly the wrong conclusion from the Reserve Mining case. *See* State Br. at 37-38. It is true, as the State points out, that Reserve had a permit under section 10 of the Rivers and Harbors Act and that section 404 of the Clean Water Act was a successor to the section 10 permit program. But by the time of the Clean Water Act's enactment, that permit was no longer sufficient to authorize the discharge of tailings. A Refuse Act permit was required, and the new permitting authority was transferred to EPA, not retained by the Corps.

Contrary to the assertions of Petitioners and the Corps, continued enforcement of effluent limitations by EPA is entirely consistent with the division of responsibilities intended by Congress. It will have no

impact on traditional regulation of fill material, because typical fill-material discharges do not come from sources regulated by EPA effluent limitations. Fill material is normally used to build roads, buildings, dams, causeways, levees, seawalls, and other useful structures in waters. *See* 33 C.F.R. § 323.2(f). Discharges of fill material also include placement of overburden (the unprocessed rock overlying a coal seam) and other mining-related materials that are not subject to effluent limitations. *See id.*; *Kentuckians*, 317 F.3d at 445, 448; J.A. 542a, 546a. As far as the record reflects, this case is the first time the Corps has tried to use a fill material permit to authorize a wastewater discharge from an industrial source subject to effluent limitations.

E. Exempting Wastewater Discharges Containing Solids from Effluent Limitations Would Undermine Congressional Goals.

If the Corps' position in this case is upheld, any source that generates wastewater with significant suspended solids will be able to escape EPA effluent limitations by labeling the discharge "fill material." Such sources will similarly seek to save money by using navigable waters as "settling ponds," defeating the Congressional goal of eliminating all discharges to navigable waters, 33 U.S.C. § 1251(a)(1), and reversing decades of progress in reducing pollution through the Act's scheme of technology-based effluent limitations. EPA has frequently identified settling ponds as the best technology for removing solids from process wastewater, allowing the agency to set strict limits on suspended solids through effluent limitations. Examples include:

- aluminum smelting, 38 Fed. Reg. 33,170, 33,175 (Nov. 30, 1973) (noting that the solid portion of untreated wastewater "approaches 70 percent by volume");

- copper smelting, 45 Fed. Reg. 44,926, 44,930 (July 2, 1980);

- inorganic chemicals manufacturing, 42 Fed. Reg. 37,294, 37,296 (July 20, 1977);

- ferroalloy manufacturing, 38 Fed. Reg. 29,008, 29,010 (Oct. 18, 1973);

- cement manufacturing, 38 Fed. Reg. 24,462, 24,463 (Sept. 7, 1973);

- concentrated aquatic animal production, 67 Fed. Reg. 57,872, 57,888 (Sept. 12, 2002) ("Solids, which come from feces and uneaten feed, are the largest mass of pollutants generated in CAAP facilities.");

- beef cattle feedlots, 66 Fed. Reg. 2960, 2988 (Jan. 12, 2001); *see also* 40 C.F.R. § 412.31(a) (prohibiting "discharge of manure, litter, or process wastewater pollutants into waters of the U.S.");

- coal-fired power plants, 45 Fed. Reg. 68,328, 68,337 (Oct. 14, 1980); and

- battery manufacturing, 49 Fed. Reg. 9108, 9122 (March 9, 1984).

II. IF THE CLEAN WATER ACT WERE AMBIGUOUS, THE COURT SHOULD DEFER TO THE INTERPRETATION STATED BY THE HEADS OF BOTH AGENCIES UPON PROMULGATION OF THE 2002 FILL RULE.

If the Court were to find the Clean Water Act ambiguous as to whether all discharges meeting the definition of "fill material" are exempt from section 306(e), the Court should defer to the reasonable interpretation of the Act adopted by EPA and the Corps when they adopted the relevant regulations, *see Chevron*, 467 U.S. at 843-44, and not to the subsequent mischaracterization of those regulations in the Regas memo.

A. The Agencies' Regulations Reveal that Some Discharges Meeting the Definition of "Fill Material" Are Subject to Effluent Limitations and NPDES Permits.

The plain language and history of the relevant regulations, and the practices of EPA and the Corps, reveal that the agencies have long recognized that some discharges defined as "fill material" are nevertheless subject to effluent limitations and NPDES permits and not eligible for section 404 permits.

As an initial matter, the 2002 fill rule on its face, though not ambiguous, does not answer the question presented. It is merely a definition that does not, by itself, purport to authorize anything. *See* 33 C.F.R. § 323.2(e)-(f). The question in this case is whether a wastewater discharge meeting that definition is exempt from otherwise applicable performance standards under section 306.

To be sure, the new definition did create the potential for confusion because it is broad enough to encompass many discharges that are subject to effluent limitations, like the one in this case. Were the new fill definition construed to authorize the discharge here, there would be a direct conflict between that definition and the performance standard prohibiting the discharge. *See* 40 C.F.R. § 440.104(b)(1). To resolve this potential conflict, it is necessary to examine the agencies' regulations, their history, and what the agencies said in adopting them.

Petitioners and the Corps rely heavily on 40 C.F.R. § 122.3(b), but that regulation actually proves the opposite of the point for which they cite it. It exempts from NPDES permitting requirements "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of the CWA." 40 C.F.R. § 122.3(b). There is no comma preceding "which." By its plain terms, this regulation provides that only those fill material discharges that are regulated under section 404 are exempt from section 402; its language assumes that some "fill material" discharges are *not* regulated under section 404.[13] The regulation thus interprets and applies the prefatory "except as provided" clause in

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[13] Were there a comma preceding "which," the words following the comma would be a "nonrestrictive clause," *i.e.*, one "that could be omitted without essential loss of meaning...." *The Chicago Manual of Style* 250, ¶ 6.38 (15th ed. 2003). The absence of a comma makes it a "restrictive" clause, *i.e.*, one that is "essential to the meaning of the sentence...." *Id.* While it is stylistically preferable to use "that" rather than "which" for a nonrestrictive clause, it is the absence or presence of the comma that determines whether the clause is restrictive. *Id.*

section 402(a)(1): If a discharge is properly permitted under section 404, it does not also require a 402 permit, but not all discharges of "fill material" are properly permitted under section 404. *See* 33 U.S.C. § 1342(a)(1).

The history of section 122.3(b) confirms this interpretation. As the Corps correctly points out, the original regulation purported to exempt all fill material, without restriction. *See* Fed. Br. at 27 (citing 40 C.F.R. § 125.4(d) (1973)). The Corps overlooks that EPA changed this regulation just a few years later to exempt only those discharges that are both "[d]ischarges of dredged or fill material into waters of the United States *and* regulated under section 404 of the Act." 44 Fed. Reg. 32,854, 32,902 (June 7, 1979) (adopting 40 C.F.R. § 122.4(a)(2)) (emphasis added). The following year, EPA changed "and" to "which are," the same language that remains today. 45 Fed. Reg. 33,290, 33,442 (May 19, 1980) (adopting 40 C.F.R. § 122.51(c)(2)(ii)). The preamble did not explain this specific change but stated generally, "Minor editorial and stylistic changes ... have been made in all sections and are not discussed." *Id.* at 33,294. This history reveals that the "which are" clause was intended to be restrictive—requiring that the discharge be both "fill material" and regulated under section 404—consistent with proper grammar.[14]

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[14] This interpretation was necessary when the rule in its current form was adopted, because EPA and the Corps had differing definitions of "fill material." Many discharges that EPA considered "fill material" were not within the Corps' definition and were therefore ineligible for section 404 permits. *See supra* p. 10; *infra* pp. 49-50.

That the new "fill material" definition did not create an exception to EPA's effluent limitations is further compelled by the canon of construction that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The 1982 performance standard is much more "narrow, precise, and specific" than the "later enacted" fill rule. The latter is a broad definition of "fill material" without independent operative effect. The 1982 performance standard is more specific as to the discharges covered ("process wastewater," as defined at 40 C.F.R. § 401.11(q)), the source to which it applies (new mills using the froth-flotation process for the beneficiation of gold ores), and the effect of the rule ("no discharge"). 40 C.F.R. § 440.104(b)(1).

B. EPA Intended the Effluent Limitations for Ore Beneficiation Mills to Be Applied in Permits Under Section 402, Not 404.

Longstanding practice confirms that the agencies did not intend all discharges meeting the definition of "fill material" to be exempt from EPA's effluent limitations. For decades, EPA issued NPDES permits for discharges that met its effect-based definition of "fill material" but were also subject to effluent limitations. *See* J.A. 83a-84a. Throughout that time, EPA continued to adopt effluent limitations for sources—including the ore mills at issue—whose wastewater contained high concentrations of suspended solids and would therefore have a filling effect if discharged directly to navigable waters. *See supra* pp. 7-9, 44-45. Thus, EPA recognized that some discharges meeting its definition of "fill mate-

rial" were not regulated under section 404 and therefore not exempt from NPDES permitting under 40 C.F.R. § 122.3(b). Indeed, even the Regas memo recognizes that some discharges—those with an "incidental" filling effect—would meet the new definition of "fill material" but not be eligible for section 404 permits. J.A. 145a.

When adopting new source performance standards for ore mines and mills in 1982, EPA left no doubt as to the intended permitting requirements: "The ... [standards] in this regulation will be applied to individual ore mines and mills through NPDES permits issued by EPA ... under Section 402 of the Act." 47 Fed. Reg. at 54,606. Nowhere in the rule or preamble, or in their predecessors or subsequent minor amendments, did EPA suggest that a mill could escape these standards through a permit to discharge wastewater as "fill material" under section 404. This was true even though EPA recognized that the wastewater contained very high levels of suspended solids, generally requiring the use of settling ponds as a treatment technology. *See supra* pp. 3, 9.

Further evidence of EPA's intent is that it used limits on suspended solids as a surrogate for limits on certain toxic pollutants. As Petitioners and the Corps point out, the Corps must ensure that discharges of fill material comply with any effluent limitations for toxic pollutants adopted under section 307 of the Act. *See* 33 U.S.C. § 1344(f), (h)(1)(A)(i), (p), (r); 40 C.F.R. § 230.10(b)(2). One of the toxic substances of concern in the wastewater discharges of many beneficiation mills is asbestos, as the Reserve Mining case illustrates. *See* 47 Fed. Reg. at 25,694 ("'Asbestiform fibers' are evident in dis-

charges from ore mining and milling facilities, and chrysotile asbestos was detected in wastewaters in all subcategories and subparts."); 40 C.F.R. § 401.15(7) (listing asbestos as toxic pollutant under CWA § 307(a)(1)); *Reserve Mining*, 514 F.2d at 501, 514-20. EPA did not adopt section 307 effluent limitations for asbestos from beneficiation mills because it found that limits on total suspended solids (TSS) under sections 301 and 306 would effectively control asbestos and obviate the significant expense of monitoring for it. *See* 47 Fed. Reg. at 25,694-95; *see also id.* at 25,703-04; 47 Fed. Reg. at 54,605. If a mill were allowed to escape the TSS limitations by obtaining a "fill material" permit under section 404, it would effectively escape the intended limit on asbestos, a result at odds with section 404's intent to control discharges of toxic pollutants.

That EPA used this approach (rather than promulgating section 307 standards for asbestos that could be enforced through section 404) shows that the agency could not have intended section 404 permits to be used to authorize discharges subject to its ore-mill performance standards. It also illustrates the potentially dangerous effects of the interpretation sought by the Corps in this case. Authorizing ore beneficiation wastewater discharges with section 404 permits could reprise the Reserve Mining scenario, one of the very problems Congress intended to stop.

In the decades following adoption of the first effluent limitations for ore beneficiation mills in 1975 and the new source performance standards in 1982, the agencies repeatedly confirmed that section 404 permits were not available for process wastewater

discharges from these facilities. From 1977 to 2002, the Corps' regulations excluded discharges for the primary purpose of waste disposal from the definition of "fill material." *See supra* p. 10. The agencies' 1986 MOA provided that discharges "in liquid, semi-liquid, or suspended form," including various "mining wastes," would require section 402 permits.[15] *See id.* The agencies interpreted their regulations to preclude the use of section 404 permits for discharges subject to effluent limitations. *See Kentuckians*, 317 F.3d at 445, 448.

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[15] Petitioners and the Corps rely on a sentence from the MOA's preamble that has no applicability to wastewater discharges from ore mills for the purpose of waste disposal, which were described in paragraph B.5. *See* Fed. Br. at 27; Alaska Br. at 9. They quote the second sentence of the following paragraph:

> This agreement does not affect the regulatory requirements for materials discharged into waters of the United States for the primary purpose of replacing an aquatic area or of changing the bottom elevation of a water body. Discharges listed in the Corps definition of "discharge of fill material," 33 CFR 323.2(1) remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria in the agreement for section 402 discharges.

51 Fed. Reg. at 8,871. This explanation discussed and incorporated the Corps' "fill material" definition, which at that time required that the primary purpose of the discharge be to create dry land or change the bottom of the water body, not to dispose of waste. *See id.* Thus, the sentence merely clarified that discharges meeting this definition were subject to section 404 permits even if they occurred in association with waste otherwise subject to section 402. This clarification did not apply to discharges like the one here, whose only purpose was to dispose of process wastewater.

Accordingly, as far as the record reflects, the Corps never issued a permit to discharge process wastewater into a navigable water body before the 2005 Kensington Mine permit. Coeur cites three permits it holds out as counterexamples, *see* Coeur Br. at 40-42, but all three miss the mark.

The Red Dog and Fort Knox permits were both permits to use solid fill material to build tailings impoundments and associated structures; they did not permit the ongoing discharge of wastewater into navigable waters. *See* SER 979 (authorizing permittee to "place ... mine tailings in the south fork of Red Dog Creek and adjacent wetlands *to construct a 150' high x 2,400' long dam*")[16] (emphasis added); SER 1099 (Red Dog Decision); SER 983 (authorizing discharge of fill material for "construction of impoundment structures, stockpiles, rock dumps, culverted road crossings, and other components" of Fort Knox mine). Neither mine obtained a permit for discharges into the tailings ponds themselves, because the agencies determined that the tailings ponds were "waste treatment systems" not considered "waters of the United States" under the Clean Water Act. *See* 40 C.F.R. § 122.2 (definition of "Waters of the United States"). Thus, the decision document for the Fort Knox mine explicitly stated that "[n]o discharge of waste water *to waters of the United States* is expected...." SER 989 (emphasis added).

In contrast, EPA and the Corps rejected a suggestion that Lower Slate Lake be deemed an exempt

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[16] Dewatered tailings are sometimes used as a construction material in dams at mines.

"waste treatment system," notwithstanding the construction of a dam to expand its capacity. J.A. 145a-46a. The Kensington Mine's 404 permit, unlike those for the Red Dog and Fort Knox mines, expressly authorizes discharges of process wastewater into navigable waters. *See* J.A. 275a (¶ 10), 283a (Area 24), 266a (authorizing discharge to "navigable waters of the United States").[17]

Nor did the other permit cited by Coeur—Nationwide Permit 21, for minimal-impact surface coal-mining work—authorize discharges of process wastewater into navigable waters. It was originally promulgated in the same Federal Register notice as a re-promulgation of the Corps' former "fill material" definition, which precluded discharges for the primary purpose of waste disposal. *See* 47 Fed. Reg. 31,794, 31,811 (July 22, 1982) (adopting "fill material" definition); *id.* at 31,833 (adopting Nationwide Permit 21). Presumably, the Corps did not intend to contradict itself within the same document. Thus,

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[17] There is a legal question whether, or under what circumstances, the Corps may deem an impoundment in a navigable stream to be a "waste treatment system." *See, e.g., Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, No. 3:05-0784, 2007 WL 2200686 (S.D. W.Va. June 13, 2007), *appeals docketed*, Nos. 07-1355, 07-1479, 07-1480, 07-1964 (consolidated) (4th Cir.). Normally, the tailings pond can be constructed outside of any stream by diverting the stream around the tailings pond, segregating the waste treatment system from navigable waters. *See, e.g.*, SER 995; *see also* Pac. Legal Found. *Amicus* Br. at 14 (diagramming "stream bypass"). This Court need not address these questions here because the agencies expressly declined to deem the lake a "waste treatment system" and recognized it as "waters of the United States."

the "[s]tructures, work, and discharges," *id.* at 31,833, authorized in Nationwide Permit 21 could not have included wastewater discharges.

In short, if the Corps ever granted a "fill material" permit to discharge process wastewater to navigable waters before the Kensington permit, it has not been brought to the attention of the Court, even though Petitioners canvassed the country to find one. SEACC is unaware of any such examples.

Granting section 404 permits for wastewater discharges from ore beneficiation mills would, therefore, be a substantial change in agency practice. It would effectively repeal EPA's effluent limitations for those sources, because the wastewater from these mills is inherently "very high" in suspended solids, 47 Fed. Reg. at 25,685, and will therefore always raise the bottom elevation of a water body when the solids settle. In adopting the effluent limitations, EPA expected that solids would be removed in settling ponds, not in navigable waters. *See supra* pp. 8-9.

If the agencies wished to reverse this practice, they would be required to provide an explanation. "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change...." *State Farm*, 463 U.S. at 42. The failure to do so would render the decision arbitrary. *Id.* at 42-43.

C. When the Agencies Adopted Their New Definition of Fill Material in 2002, They Did Not Intend to Change Past Practice.

In adopting the 2002 fill rule, the agencies did not supply an analysis for changing course—"reasoned" or otherwise, *id.* at 42—because, as they repeatedly

explained, they did not intend to change course. *See supra* pp. 11-15. The original proposal would have expressly excluded discharges subject to effluent limitations, consistent with longstanding agency practice. *See* 65 Fed. Reg. at 21,297, 21,299. The agencies stated that they removed that language only because it was confusing as drafted and that the deletion did not reflect any intention to change their existing practice. *See* 67 Fed. Reg. at 31,135; J.A. 46a. They repeated this statement specifically in the context of "mine tailings," noting that mine tailing discharges subject to effluent limitations would remain so and that section 402 permits would still be needed for "process water" discharges. J.A. 47a-48a. They reiterated the point by citing paragraph B.5 of the 1986 MOA, J.A. 82a-84a, and explained that the new definition would not authorize discharges that were previously prohibited or expand the types of discharges covered under section 404. 67 Fed. Reg. at 31,133; J.A. 32a. They made these statements in the Federal Register, in their response-to-comments document incorporated in the Federal Register, and in a document posted on the Corps' website to explain the new rule to the public. *See supra* p. 13.

These statements were not isolated snippets, but were critical to the agencies' analysis and to their explanation for deleting language from the proposed regulation. Moreover, the agencies said nothing to contradict this explanation. Petitioners and the Corps cite general statements from the Federal Register that mine tailings would be considered fill material under the new rule and that EPA does not regulate fill material. *See* Fed. Br. at 35-37. However, none of these general statements addresses the specific question created where a wastewater dis-

charge, including one containing mine tailings, both meets the new "fill material" definition and is subject to a performance standard or other effluent limitation. The agencies specifically foresaw this circumstance, addressed it several times, and stated each time that the effluent limitation would govern.

The Corps argues that this interpretation would render meaningless the regulation's inclusion of "tailings," the placement of which is "generally" considered a discharge of fill material in the revised definition. *See* Fed. Br. at 39-40; 33 C.F.R. § 323.2(f). This is not so, because discharges of "slurry" or "tailings" are still eligible for section 404 permits if they are not covered by section 306 performance standards or section 301 effluent limitations. There are many minerals whose tailings are not subject to such limitations, including: platinum (40 C.F.R. § 440.110-.115)[18]; antimony (*id.* § 440.90-.95); tin (no regulation); and numerous minerals covered under 40 C.F.R. Part 436 such as mica and sericite (subpart I), trona (subpart P), lithium (subpart U), attapulgite and montmorillonite (subpart AB), kyanite (subpart AC), aplite (subpart AE), kaolin (subpart AG), feldspar (subpart AI), and talc, steatite,

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[18] EPA has adopted effluent limitations under section 307 for toxic pollutants from froth-flotation mills for platinum ores, 40 C.F.R. § 440.113(b), but no effluent limitations for conventional pollutants and no performance standards. *See id.* §§ 440.112, .114, .115. Because the Corps may apply section 307 effluent limitations (but not section 301 or 306 limitations) in section 404 permits, *see* 40 C.F.R. § 230.10(b)(2), the tailings from a platinum beneficiation mill could be subject to a section 404 permit.

soapstone, and pyrophyllite (subpart AJ), among others.

In short, when they adopted the new definition of "fill material," EPA and the Corps did not intend to make any change in EPA's effluent limitations or in the agencies' longstanding practice of applying those limitations to the process wastewater from ore beneficiation mills through section 402 permits. If the Court finds that the 2002 fill rule has the effect of reversing that practice, as the Corps now argues, *see* Fed. Br. at 40, the Court should set the regulation aside as arbitrary, since the agency did not provide a "reasoned analysis" for—and actually denied the existence of—this change. *State Farm*, 463 U.S. at 42; 5 U.S.C. § 706(2)(A); *see* J.A. 475a, ¶ 72.

D. The Regas Memo Could Not Change the Agencies' Authoritative Interpretation Published in the Federal Register.

The Regas memo, which purported to construe the 2002 fill rule, J.A. 143a-45a, could not reverse the agency's interpretation explained in the Federal Register upon adoption of the rule. An authoritative expression of an agency's interpretation of its rule is entitled to deference as to the rule's meaning. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). A clear statement in the Federal Register upon promulgation of a rule is "dispositive" of the agency's intent. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-16 (1985). Subsequent, inconsistent interpretations of the regulation do not receive deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("we must defer to the Secretary's interpretation unless an 'alternative

reading is compelled ... by other indications of the Secretary's intent at the time of the regulation's promulgation'") (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)); *accord*, *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("That the current interpretation runs counter to the 'intent at the time of the regulation's promulgation,' is an additional reason why *Auer* deference is unwarranted.") (citation omitted). Formal notice-and-comment rulemaking procedures tend "to foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (denying *Chevron* deference to informal Customs classification rulings); *see also Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (Randolph, J.) (agency may not change definitive interpretation of rule without new notice-and-comment rulemaking).

If subordinate officials could alter an agency's interpretation of regulations as published in the Federal Register by writing an internal, unpublished memo, preambles to rules published in the Federal Register would become largely meaningless. The Regas memo reveals the lack of "fairness and deliberation," *Mead Corp.*, 533 U.S. at 230, in this approach. The memo neglects entirely the repeated statements in the Federal Register and the rulemaking record that the rule was not intended to exempt discharges from applicable effluent limitations. *See* J.A. 143a-45a. Instead, the Regas memo substitutes a distinction between discharges whose filling effects are "immediate" and those that are "incidental," a distinction with no clear boundary or basis in the language of the rule and that was never mentioned at the time of the rule's promulgation. J.A. 144a-

45a. To give effect to the Regas memo would be inappropriate and inconsistent with this Court's precedents.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTES INVOLVED

Section 101 of the Clean Water Act, 33 U.S.C. § 1251

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

. . . .

Section 301 of the Clean Water Act, 33 U.S.C. § 1311

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but

in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January

1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

. . . .

Section 304 of the Clean Water Act, 33 U.S.C. § 1314

§ 1314. Information and guidelines

(a) Criteria development and publication

. . . .

(4) The Administrator shall, within 90 days after December 27, 1977, and from time to time thereafter, publish and revise as appropriate information identifying conventional pollutants, including but not limited to, pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH. The thermal component of any discharge shall not be identified as a conventional pollutant under this paragraph.

. . . .

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations,

and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes

and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 1311(b)(2)(E) of this title to be applicable to

any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

(c) Pollution discharge elimination procedures

The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published

in the Federal Register and otherwise shall be made available to the public.

. . . .

Section 306 of the Clean Water Act, 33 U.S.C. § 1316

§ 1316. National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;

paperboard, builders paper and board mills;

meat product and rendering processing;

dairy product processing;

grain mills;

canned and preserved fruits and vegetables processing;

canned and preserved seafood processing;

sugar processing;

textile mills;

cement manufacturing;

feedlots;

electroplating;

organic chemicals manufacturing;

inorganic chemicals manufacturing;

plastic and synthetic materials manufacturing;

soap and detergent manufacturing;

fertilizer manufacturing;

petroleum refining;

iron and steel manufacturing;

nonferrous metals manufacturing;

phosphate manufacturing;

steam electric powerplants;

ferroalloy manufacturing;

leather tanning and finishing;

glass and asbestos manufacturing;

rubber processing; and

timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Fed-

eral standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such

construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 307 of the Clean Water Act, 33 U.S.C. § 1317

§ 1317. Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential

presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of

publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

. . . .

(d) Operation in violation of standards unlawful

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

. . . .

Section 309 of the Clean Water Act, 33 U.S.C. § 1319

§ 1319. Enforcement

(a) State enforcement; compliance orders

. . . .

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corpora-

tion, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an exten-

sion of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

. . . .

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, ,[19] or in a permit issued under section 1344 of this title by a

---

[19] So in original.

State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

. . . .

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this

title by the Secretary, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

. . . .

Section 402 of the Clean Water Act, 33 U.S.C. § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits is-

sued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator de-

termines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

. . . .

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

. . . .

Section 404 of the Clean Water Act, 33 U.S.C. § 1344

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

. . . .

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

. . . .

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not

limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

. . . .

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

. . . .

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

. . . .

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project

pursuant to the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a perma-

nent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[20] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

. . . .

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[20] So in original. Probably should be "action".

Section 502 of the Clean Water Act, 33 U.S.C. § 1362

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

. . . .

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

. . . .

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

. . . .

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

. . . .

REGULATIONS INVOLVED

33 C.F.R. § 323.2

§ 323.2 Definitions.

For the purpose of this part, the following terms are defined:

. . . .

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

. . . .

40 C.F.R. § 122.2

§ 122.2 Definitions.

The following definitions apply to Parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

. . . .

Waters of the United States or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. . . .

. . . .

40 C.F.R. § 122.3

§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

. . . .

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

. . . .

40 C.F.R. § 230.10

§ 230.10 Restrictions on discharge.

Note: Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge comply-

ing with the requirement of these Guidelines will not automatically receive a permit.

Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines.

Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

(b) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C

through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites;

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;

(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(d) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

40 C.F.R. § 401.11

§ 401.11 General definitions.

For the purposes of Parts 402 through 699 of this subchapter:

. . . .

(f) The term *pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. . . .

. . . .

(q) The term *process waste water* means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

(r) The term *process waste water pollutants* means pollutants present in process waste water.

. . . .

40 C.F.R. § 440.100

§ 440.100 Applicability; description of the copper, lead, zinc, gold, silver, and molybdenum ores subcategory.

(a) The provisions of this Subpart J are applicable to discharges from—

(1) Mines that produce copper, lead, zinc, gold, silver, or molybdenum bearing ores, or any combination of these ores from open-pit or underground operations other than placer deposits;

(2) Mills that use the froth-flotation process alone or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores, or any combination of these ores;

(3) Mines and mills that use dump, heap, in-situ leach, or vat-leach processes to extract copper from ores or ore waste materials; and

(4) Mills that use the cyanidation process to extract gold or silver.

(b) Discharge from mines or mines and mills that use gravity separation methods (including placer or dredge mining or concentrating operations, and hydraulic mining operations) to extract gold ores are regulated under Subpart M.

(c) Discharge from mines (including placer or dredge mining, and hydraulic mining operations) or mines and mills that use gravity separation methods to extract silver from placer ores are not covered under this part.

(d) The provisions of this subpart shall not apply to discharges from the Quartz Hill Molybdenum Project in the Tongass National Forest, Alaska.

40 C.F.R. § 440.104

§ 440.104 New source performance standards (NSPS).

Except as provided in Subpart L of this part any new source subject to this subsection must achieve the following NSPS representing the degree of effluent reduction attainable by the application of the best available demonstrated technology (BADT):

. . . .

(b)(1) Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores. The Agency recognizes that the elimination of the discharge of pollutants to navigable waters may result in an increase in discharges of some pollutants to other media. The Agency has considered these impacts and has addressed them in the preamble published on December 3, 1982.

(2)(i) In the event that the annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility exceeds the annual evaporation, a volume of water equal to the difference between annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility and annual evaporation may be discharged subject to the limitations set forth in paragraph (a) of this section.

(ii) In the event there is a build up of contaminants in the recycle water which significantly interferes with the ore recovery process and this interference can not be eliminated through appropriate treatment of the recycle water, the permitting authority may allow a discharge of process wastewater in an amount necessary to correct the interference problem after installation of appropriate treatment. This discharge shall be subject to the limitations of paragraph (a) of this section. The facility shall have the burden of demonstrating to the permitting authority that the discharge is necessary to eliminate interference in the ore recovery process and that the interference could not be eliminated through appropriate treatment of the recycle water.

. . . .

40 C.F.R. § 440.132

§ 440.132 General definitions.

. . . .

(f) "Mill" is a preparation facility within which the metal ore is cleaned, concentrated, or otherwise processed before it is shipped to the customer, refiner, smelter, or manufacturer. A mill includes all ancillary operations and structures necessary to clean, concentrate, or otherwise process metal ore, such as ore and gangue storage areas and loading facilities.

. . . .

REPLY BRIEF

Supreme Court, U.S.
FILED
DEC 6 - 2008
OFFICE OF THE CLERK

Nos. 07-984 and 07-990

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page

A. The text and structure of the CWA make clear that discharges of fill material are regulated under Section 404 of the Act rather than under Section 402 4

B. Neither Section 306 itself, nor any performance standard promulgated by EPA pursuant to that provision, limits the Corps' permitting authority under Section 404 6

C. Under established principles of administrative law, this Court owes deference to the responsible agencies' shared understanding on the question presented 11

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 3, 13, 14

Barnhart v. *Walton*, 535 U.S. 212 (2002) 17

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 4

Federal Express Corp. v. *Holowecki*, 128 S. Ct. 1147 (2008) 14

Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 18

Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339 (2007) 15, 18

National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 12

National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 21

Cases—Continued: Page

Reserve Mining Co. v. *EPA*, 514 F.2d 492 (8th Cir. 1975) 5
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) 21

Statutes, regulations and rules:

Clean Water Act, 33 U.S.C. 1251 *et seq.*:
§ 301, 33 U.S.C. 1311 ..... 2, 9, 19
§ 301(a), 33 U.S.C. 1311(a) 6, 7
§ 306, 33 U.S.C. 1316 ..... *passim*
§ 306(e), 33 U.S.C. 1316(e) 2, 7, 8, 10
§ 307, 33 U.S.C. 1717 ..... 7, 8, 9, 10
§ 307(a)(5), 33 U.S.C. 1317(a)(5) 7
§ 318, 33 U.S.C. 1328 10
§ 402, 33 U.S.C. 1342 ..... *passim*
§ 402(a), 33 U.S.C. 1342(a) 4
§ 402(a)(1), 33 U.S.C. 1342(a)(1) 10
§ 402(k), 33 U.S.C. 1342(k) 9
§ 404, 33 U.S.C. 1344 ..... *passim*
§ 404(a), 33 U.S.C. 1344(a) 2, 4, 5, 10
§ 404(b)(1), 33 U.S.C. 1344(b)(1) 4, 7, 8, 20
§ 404(p), 33 U.S.C. 1344(p) 9, 10
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 8
Rivers and Harbor Act of 1899, ch. 425, 30 Stat. 1121:
§ 10, 30 Stat. 1151 5
§ 13, 30 Stat. 1152 5

Regulations and rules—Continued: Page

33 C.F.R.:
Pt. 323:
Section 323.2(e)(1) 20
Section 323.2(f) 20
40 C.F.R.:
Pt. 122:
Section 122.3(b) 13
Pt. 125:
Section 125.4(d) (1973) 13
Pt. 230:
Section 230.10 4
Section 230.10(a)(4)-(5) 8
Section 230.10(b)(2) 7, 8
Section 230.10(b)(3)-(4) 8
Pt. 232:
Section 232.2 20
Pt. 440, Subpart J 17
Section 440.104(b)(1) 3, 12, 14

Miscellaneous:

The Chicago Manual of Style (15th ed. 2003) 13
42 Fed. Reg. 37,145 (1977) 14
45 Fed. Reg. 33,294 (1980) 14
65 Fed. Reg. (2000):
p. 21,292 19
p. 21,297 19
p. 21,299 19

Miscellaneous—Continued: Page

67 Fed. Reg. (2002):
p. 31,133 19
p. 31,135 ..... 5, 16, 20

In the Supreme Court of the United States

No. 07-984

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

No. 07-990

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

Taken together, three crucial aspects of the statutory and regulatory scheme demonstrate that the Army Corps of Engineers (Corps) properly exercised permitting jurisdiction over the proposed discharge of mine tailings at issue in this case. Those provisions further demonstrate that the Corps, in making its permitting decision, was not required to apply a new-source performance standard issued by the

Environmental Protection Agency (EPA) pursuant to Section 306 of the Clean Water Act (CWA), 33 U.S.C. 1316.

First, Section 404 of the CWA states, without qualification or exception, that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. 1344(a). Second, the substantive criteria governing the Corps' permitting decisions under Section 404, which are tailored to the distinct concerns raised by discharges of fill and dredged material, do not require compliance with EPA effluent limitations promulgated under Section 301 or 306. See Gov't Br. 19-21; SEACC Br. 37.[1] Third, the proposed discharge of mine tailings at issue here constitutes a "discharge of fill material" as that term has been defined by the Corps and EPA in a regulation (the fill rule) issued jointly by the two agencies in 2002. See Gov't Br. 33-35; SEACC Br. 20 (acknowledging that proposed discharge "meets the agencies' new definition of 'fill material'").

Respondent SEACC does not dispute any of the three propositions set forth above. SEACC nevertheless contends that the permit at issue here is unlawful because Section 306(e), which prohibits "any owner or operator of any new source" from "operat[ing] such source in violation of any standard of performance applicable to such source," 33 U.S.C. 1316(e), precludes the issuance of a Section 404 permit for the discharge of pollutants that are covered by EPA new-source performance standards. Section 306(e), however, is limited by its terms to "applicable" performance standards, and it does not speak to the question whether a particular performance standard is "applicable" to any specific discharge. Rather, that question is resolved by exam-

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[1] All citations to "SEACC Br." refer to the brief on the merits filed by respondents Southeast Alaska Conservation Council, et al.

ining the dual permitting structure of the Act (which vests the Corps with permitting authority for discharges of dredged or fill material under Section 404, leaving EPA with authority to permit all *other* discharges under Section 402) and the distinct requirements governing Section 404 permits (which, as SEACC concedes, do not require compliance with Section 306 effluent limitations).

Because EPA has broad discretion in establishing the relevant new-source performance standard (40 C.F.R. 440.104(b)(1)), SEACC's argument ultimately reduces to the contention that the Section 404 permit in this case frustrates EPA's policy judgments. EPA itself, however, does not share that view. It not only joined the government's opening brief in this case, but more to the point—as that brief explained—explicitly determined (in its 2004 Mine Tailings memorandum) that the new-source performance standard does not apply to the proposed tailings discharge. EPA's reasonable view as to the applicability of its own regulation warrants substantial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 460-461 (1997).

In arguing that the Corps' permitting decision in this case contravenes stated agency policies, SEACC relies in part on a *proposed* exception to the 2002 fill rule's definition of "fill material"—an exception that the agencies ultimately declined to adopt. SEACC also relies on various snippets from the rule's preamble suggesting that discharges subject to effluent limitations would be regulated under Section 402. Those inconclusive and conflicting statements cannot override the clear text of the fill rule, its articulated purpose of clarifying the line between the Corps' and EPA's permitting authority, and the agencies' considered application of the Act and the rule in this case.

In sum, while the plain terms of Sections 402 and 404 of the CWA alone require reversal of the Ninth Circuit's deci-

sion, the agencies' reasonable and longstanding interpretation of those provisions is at a minimum entitled to deference and leads to the same conclusion. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

A. The Text And Structure Of The CWA Make Clear That Discharges Of Fill Material Are Regulated Under Section 404 Of The Act Rather Than Under Section 402

1. As our opening brief explains (at 18-19), the division of CWA permitting authority between the Corps and EPA turns not on whether a proposed discharge implicates an EPA effluent limitation, but on whether the discharge involves "dredged or fill material." Section 404 states without qualification that the Corps may issue permits for the "discharge of dredged or fill material." 33 U.S.C. 1344(a). Section 402 governs *other* discharges by stating that, "*[e]xcept as provided in section [318 and 404]*, the Administrator may * * * issue a permit for the discharge of any pollutant." 33 U.S.C. 1342(a) (emphasis added).

SEACC's admonition (Br. 31-32) that implied exceptions to statutory requirements are disfavored is therefore beside the point. Under the *express* terms of Sections 404 and 402, the authority to issue permits for discharges of fill material is vested in the Corps and denied to EPA. That dual-permitting regime effectuates Congress's determination that the two types of discharges should be treated differently in light of their different impacts. See Gov't Br. 19-21. In particular, as implemented through a joint Corps/EPA regulation that defines the term "fill material," that regime ensures that discharges—like those at issue here—that have the effect of replacing a portion of a covered water or changing its bottom elevation will be regulated under the distinct permitting criteria set forth in the Section 404(b)(1) Guidelines. See 33 U.S.C. 1344(b)(1); 40 C.F.R. 230.10.

2. SEACC contends that the discharge of any pollutant covered by an EPA effluent limitation guideline must be regulated by EPA under Section 402, rather than by the Corps under Section 404, even if the discharge constitutes "fill material" under the applicable regulation. SEACC Br. 21-23, 35-38. Acceptance of that contention would effectively rewrite Section 404(a) to provide that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters at specified disposal sites, *except when EPA has promulgated a new-source performance standard or effluent limitation that covers the relevant source*." There is no justification for importing that language into the Act and imposing a limitation on the Corps' permitting authority that Congress declined to enact. Acceptance of SEACC's position would also mean that, in cases where the relevant effluent limitation is not a zero-discharge standard, EPA could issue permits for discharges that both EPA and the Corps regard as discharges of "fill material"—something that EPA has never done and that Congress would not have expected it to do. See 67 Fed. Reg. 31,135 (2002) ("EPA has never sought to regulate fill material under effluent guidelines.").[2]

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[2] Contrary to SEACC's suggestion (Br. 42-43), the Eighth Circuit's 1975 decision in *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 529-531 (requiring permit for disposal of mine tailings into Lake Superior under Section 13 of Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1152, in addition to an existing permit under Section 10, 30 Stat. 1151, of that Act) has no bearing on the question whether Section 402 or 404 governs here. As an initial matter, that case focused on the Rivers and Harbors Act, not the CWA. Although Sections 10 and 13 of the Rivers and Harbors Act were precursors to Sections 404 and 402 of the CWA, respectively, Sections 10 and 13 (unlike Sections 404 and 402) were not viewed as mutually exclusive. See *Reserve Mining Co.*, 514 F.3d at 530 & n.73. Moreover, the court in *Reserve Mining Co.* did not determine whether the discharge at issue was a discharge of "fill mater-

B. Neither Section 306 Itself, Nor Any Performance Standard Promulgated By EPA Pursuant To That Provision, Limits The Corps' Permitting Authority Under Section 404

SEACC argues that, even if a particular discharge falls within the current regulatory definition of "fill material," the Corps lacks authority to permit the discharge if the relevant pollutant is covered by a performance standard issued by EPA pursuant to Section 306. In SEACC's view, the Corps lacks authority to regulate in those circumstances even if the proposed discharge complies with the relevant standard of performance. SEACC Br. 23-36, 36-38. That argument lacks merit.

1. Although SEACC defends the court of appeals' ultimate conclusion that the permit at issue here is invalid, it does not endorse the textual analysis that led the court to that result. The Ninth Circuit concluded that Congress's use of the word "and" as a connector in Section 301(a) "indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, *even those that facially qualify for permitting under § 404*." 07-984 Pet. App. 15a (emphasis added). SEACC, by contrast, acknowledges that the connector "and" in Section 301(a) signifies only that discharges must comply with each *applicable* provision. SEACC Br. 38-39; see Gov't Br. 24-25. Accordingly, SEACC recognizes that, because Section 301(a) does not "answer whether a particular section applies to a particular source or discharge," it does not resolve the question presented in this case. SEACC Br. 39.

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ial" as then defined, nor is it clear whether that discharge would satisfy the current definition of fill material. By contrast, there is no doubt that the discharge of mine tailings proposed here now qualifies as a discharge of fill material within the meaning of Section 404. See Pt. C, *infra*.

Instead, SEACC relies primarily on the text of Section 306(e), which makes it unlawful to operate a new source "in violation of any standard of performance applicable to such source." 33 U.S.C. 1316(e). But Section 306(e), like Section 301(a), is not dispositive here because it does not address the question whether new-source performance standards are "applicable" to discharges of fill material. And, as our opening brief explains (at 21-23, 25), the most natural reading of the Act as a whole is that the availability of a Section 404 permit for a discharge of fill material is not contingent on the regulated party's compliance with any new-source performance standard promulgated under Section 306. Neither Section 404 nor the Section 404(b)(1) Guidelines require compliance with EPA effluent limitations, except for toxic effluent limitations promulgated under Section 307. See 40 C.F.R. 230.10(b)(2).

Notably, Section 307 authorizes EPA (in consultation with the Corps) to subject discharges of dredged material to toxic effluent limitations. 33 U.S.C. 1317(a)(5). If EPA exercises that option, however, the Corps is not divested of its permitting authority over the relevant discharge, but rather is directed to apply specific substantive criteria in making its permitting decision. Congress's treatment of toxic effluent limitations strongly suggests that, if Congress *had* intended for discharges of fill material to be subject to new-source performance standards, it would have added to Section 306 a provision analogous to Section 307(a)(5). Section 306 contains no such provision, however, and SEACC expressly disavows any contention that the Corps, in ruling on Section 404 permit applications, must or should apply new-source performance standards promulgated by EPA. SEACC Br. 37. The alternative that SEACC advocates —*i.e.*, that permitting authority over fill material is transferred from the Corps to EPA whenever a Section 306 per-

formance standard addresses the source of the discharge—is inconsistent not only with the allocation of permitting authority established by Sections 402 and 404, but also with Congress's treatment of toxic discharges under Section 307.

2. SEACC's other textual arguments are likewise unpersuasive.

a. Citing the Section 404(b)(1) Guidelines' introductory reference to "other laws" that may preclude a Section 404 permit in particular circumstances, SEACC argues that the Corps "must also refrain from authorizing discharges that would violate section 306(e)." SEACC Br. 27. SEACC's reference to "discharges that would violate section 306(e)" does not advance its argument because it simply assumes that discharges of fill material are subject to Section 306 new-source performance standards—precisely the question at issue. The Guidelines' reference to "other laws" cannot plausibly be read to encompass Section 306(e), which is part of the CWA itself rather than a separate statute such as the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* Although the Guidelines identify numerous statutes that may limit the Corps' discretion (see 40 C.F.R. 230.10(a)(4)-(5) and (b)(3)-(4)), Section 306(e) is not one of them. SEACC's inference is especially implausible given that the Guidelines explicitly reference other CWA provisions, such as Section 307, as limitations on the scope of permissible discharges. See 40 C.F.R. 230.10(b)(2).

Moreover, when one of the laws referenced in the Section 404 Guidelines applies to a proposed discharge of fill material, the Corps retains permitting authority over the proposed discharge, though its decision whether to grant or deny the permit application must be consistent with the applicable law. Cf. p. 7, *supra*. The existence of other legal constraints on the Corps' discretion simply underscores the

anomalous nature of the regime that SEACC advocates, under which the purported applicability of one such constraint (an EPA performance standard) has the effect of transferring permitting authority to a different federal agency. SEACC identifies no other law whose potential applicability to a particular discharge of fill material divests the Corps of authority to determine (through the permitting process) whether and under what conditions the proposed discharge should be allowed.

b. SEACC also observes (Br. 27-28) that, whereas Section 404(p) shields dischargers who comply with a Section 404 permit from actions enforcing Sections 301 and 307, but not from actions enforcing Section 306, Section 402(k) provides that NPDES permittees are deemed to be in compliance with Section 306 as well. From that comparison, SEACC concludes (Br. 28) that Section 404 does not "exempt[]" discharges of fill material from compliance with Section 306. That is incorrect.

At least where a particular standard of performance is not a zero-discharge standard, a determination that the standard applies to a particular discharge does not necessarily mean that the discharge is precluded. Thus, if Congress had intended for Section 306 performance standards to apply to discharges of fill material, it would have authorized either the Corps or EPA to determine, through the appropriate permitting process, whether the applicable standard is satisfied in a particular case. If Congress had expected the Corps to apply Section 306 performance standards in ruling on Section 404 permit applications, it presumably would have included a reference to Section 306 in Section 404(p), as it did in Section 402(k), to ensure that the Corps' permitting decision would preclude a subsequent citizen suit alleging non-compliance with Section 306. See Gov't Br. 22 n.5. The absence of any such reference in Sec-

tion 404(p) strongly indicates that one theoretically possible means of addressing discharges of fill material in which the relevant constituent substance is covered by an EPA performance standard—*i.e.*, vesting the Corps with permitting authority over such discharges, while requiring the Corps to apply the performance standard in its substantive permitting decision (as the Corps is required to do with Section 307 toxic effluent limitations)—is not what Congress intended.

It does not follow, however, as SEACC contends, that permitting authority over that category of discharges resides with EPA. That approach is inconsistent with the text of Sections 402 and 404 and with the overall structure of the Act, under which, as discussed, the identity of the appropriate permitting agency for a particular discharge turns solely on whether "dredged or fill material" is involved. As explained above, the CWA explicitly vests the Corps rather than EPA with permitting authority over *all* discharges of "dredged or fill material."

Rather, the more natural inference from the various statutory provisions taken together is that Section 404 permittees have no need of an exemption from suits to enforce Section 306 because neither Section 306(e) nor any Section 306 performance standard applies to discharges of fill material in the first place. That reading fully explains the absence of any reference to Section 306 in Section 404(p). It also respects the basic division of permitting authority between the Corps, which regulates "discharge[s] of dredged or fill material," 33 U.S.C. 1344(a), and EPA, which is authorized to issue discharge permits "[e]xcept as provided in sections" 318 and 404, 33 U.S.C. 1342(a)(1).

c. SEACC also argues that, if Section 306(e) does not apply to discharges of fill material, Section 404 permittees will circumvent EPA effluent limitation guidelines, and

harmful wastewater discharges will escape effective regulation. See SEACC Br. 44-45. That is incorrect. Section 404's permitting framework itself provides for rigorous, broad-scale environmental review of proposed fill-material discharges by the Corps, all subject to EPA's ultimate veto. See Gov't Br. 20-23. Moreover, for any discharges into navigable waters beyond the initial deposit of fill material, dischargers must obtain a Section 402 permit and comply with all its requirements. In this case, for example, EPA applied the effluent limitations set forth in the new-source performance standard (in conjunction with even stricter Alaska water-quality standards) to discharges from the Lower Slate Lake impoundment to downstream waters. See Gov't Br. 11; J.A. 287a-331a. Before issuing the Section 402 permit, EPA required Coeur to take various mitigation measures to ensure compliance with those standards. *Ibid.*[3]

C. Under Established Principles Of Administrative Law, This Court Owes Deference To The Responsible Agencies' Shared Understanding On The Question Presented

SEACC's discussion of the agencies' interpretations of the Act blurs two distinct issues. First, the Corps and EPA have consistently agreed that, once a particular discharge is found to constitute "fill material," permitting authority over that discharge is vested in the Corps under Section 404 rather than in EPA under Section 402. The agencies' position on that question has not changed over time, and

[3] At least in some circumstances, regulating the type of discharges at issue here under Section 404 may lead to better overall environmental outcomes, once the alternatives are considered. See Gov't Br. 40. In this case, the Forest Service and Corps determined that the proposed wet tailings impoundment in Lower Slate Lake was "environmentally preferable" to the alternative dry tailings disposal in adjacent wetlands. J.A. 354a; see J.A. 218a. SEACC elected not to challenge that determination.

the agencies have never recognized an exception to that rule for discharges of pollutants that would otherwise be subject to an EPA performance standard. By contrast, the standards used by the agencies to determine whether particular discharges constitute "fill material" *have* changed over time. In the 2002 fill rule, however, the Corps and EPA resolved their prior disagreement on that issue and jointly promulgated a regulatory definition of the term "fill material." Under the principles announced in *Chevron*, this Court owes deference to the agencies' current, considered views on both issues.

1. Since the CWA was enacted, the Corps and EPA have consistently expressed the view that all discharges of fill material—including discharges containing constituent substances subject to EPA effluent limitation guidelines—are subject to regulation under Section 404 rather than under Section 402. See Gov't Br. 26-28. That understanding of the division of permitting authority between the Corps and EPA, jointly endorsed by the agencies charged with administering the Act, is entitled to *Chevron* deference. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (deferring to "the implementing agency's expert interpretation," which "harmonizes the statutes," to resolve a potential conflict between the requirements of the CWA and those imposed by the Endangered Species Act); Alaska Br. 43-44.

Because EPA has broad discretion in establishing the relevant new-source performance standard pursuant to Section 306, SEACC cannot plausibly contend that the Corps' issuance of a Section 404 permit to Coeur runs afoul of any particularized *congressional* policy determination. Rather, SEACC's challenge to the permit ultimately reduces to the contention that the proposed discharge will subvert the *EPA* policy choice reflected in 40 C.F.R.

440.104(b)(1). But EPA is in the best position to make that determination. And SEACC's argument is contradicted by EPA's controlling interpretation of its regulations, not to mention the Corps' understanding of its own permitting authority. See *Auer*, 519 U.S. at 460-461. SEACC nevertheless takes issue with several of the agencies' pronouncements.

First, SEACC disputes the agencies' understanding of an EPA regulation, dating back to 1973, that exempts discharges of dredged or fill material into the waters of the United States from NPDES permitting requirements. The current version reads: "The following discharges do not require NPDES permits: * * * Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of the CWA." 40 C.F.R. 122.3(b). SEACC contends that the absence of a comma preceding "which" indicates that the clause is intended to be restrictive, and that some "fill material" discharges are not regulated under Section 404 (and therefore are not exempt from NPDES requirements). See SEACC Br. 47-48. That argument lacks merit.

In addition to the fact that the word "that" (rather than "which") would have been the proper relative pronoun if the clause were intended to be restrictive, see *The Chicago Manual of Style* para. 6.38, at 250 (15th ed. 2003), the regulatory history belies SEACC's understanding of 40 C.F.R. 122.3(b). The original regulation stated: "The following do not require an NPDES permit: * * * Dredged or fill material discharged into navigable waters." 40 C.F.R. 125.4(d) (1973). Over the years, EPA made minor changes to that wording without any indication that it intended to change the rule's substantive effect. In the preamble to the regulation adopting the current version, EPA stated that only "[m]inor editorial and stylistic changes * * * have been

made." 45 Fed. Reg. 33,294 (1980). The most natural reading of the current rule therefore is that discharges of fill material are categorically exempt from NPDES permitting requirements, as they clearly were under the original regulation. To the extent that any ambiguity remains, EPA's interpretation of its own regulation—as articulated before this Court—controls. See *Auer*, 519 U.S. at 461 (crediting agency interpretation in legal brief); *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1155 (2008) (same).

Second, SEACC asserts (Br. 47) that, if the 2002 fill rule is construed to encompass the discharge at issue in this case, the rule will conflict with the 1982 new-source performance standard. Contrary to SEACC's assertion (Br. 52), however, the agencies have never interpreted their regulations to preclude the issuance of Section 404 permits for discharges that constitute "fill material" but that involve constituent substances otherwise subject to effluent limitation guidelines. Before the promulgation of the 2002 fill rule, EPA had little occasion to consider whether the 1982 standard applied to discharges of "fill material" within the meaning of Section 404 because mine tailings generally did not fall within the Corps' prior definition of "fill material." See 42 Fed. Reg. 37,145 (1977) (excluding from Corps' definition of "fill material" any "pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402"). In the pre-2002 instances where the Corps did issue Section 404 permits for the discharge of mine tailings, for limited purposes such as sealing the impoundment dam at Red Dog Mine (C.A. J.S.E.R. 979), those permits did not require compliance with Section 306 standards. Thus, even before 2002, the agencies did not understand 40 C.F.R. 440.104(b)(1) to preclude the issuance of a Section 404 permit for a discharge that constituted "fill material" under the Corps' interpretation of that term. In

any event, to the extent that Section 440.104(b)(1)'s lack of an express exception for discharges of "fill material" creates a conflict with other aspects of the regulatory scheme, this Court should defer to the shared view of the Corps and EPA as to the manner in which that conflict is best resolved. See *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (giving controlling deference to agency's reconciliation of its own conflicting regulations).

Third, SEACC relies on isolated statements from the regulatory history of the fill rule suggesting that the agencies did not intend to change their regulatory approach. SEACC states (Br. 53) that, before this case, the Corps had never issued a permit for the discharge of process wastewater containing mine tailings into navigable waters. SEACC argues (Br. 55-58) that the Corps' permitting of Coeur's proposed discharges under Section 404 marks a change in course, and thus conflicts with the intent of the agencies as expressed in the rule's preamble.

Contrary to SEACC's suggestion, the Corps' prior decisions not to regulate waste-disposal activity at mine sites (at least beyond the limited Section 404 permits issued at the Red Dog and Fort Knox mines, see C.A. J.S.E.R. 979, 983-986) did not reflect the view that EPA performance standards applied to discharges of "fill material." To the extent that the Corps previously declined to exercise permitting authority over wastewater discharges similar to the one at issue here, it did so not because of any EPA performance standard, but because it did not view such discharges as involving "fill material."

The 2002 fill rule reflects an *acknowledged* change in the Corps' definition of the term "fill material," under which the term now encompasses mine tailings discharged primarily for waste disposal purposes that have the effect of replacing a portion of a covered water or changing its bot-

tom elevation. See Gov't Br. 30 & n.8. SEACC does not dispute that the discharge at issue here is "fill material" under the current regulatory definition. Although the 2002 rule will likely cause the Corps to exercise permitting authority over some discharges that it would previously have declined to regulate, that potential change in Corps practice does not suggest any change in the agencies' views on the specific legal question presented here—*viz.*, whether EPA performance standards limit the Corps' authority to permit a discharge that constitutes "fill material" under the agencies' jointly promulgated (and here uncontested) definition of that term.[4]

Notably, and not surprisingly, SEACC fails to identify *any* instance during the period before 2002 in which EPA regulated a discharge that the Corps had determined to be a discharge of fill material under the Act. See 67 Fed. Reg. at 31,135 ("EPA has never sought to regulate fill material under effluent guidelines."). And during that period, the Corps consistently regulated under Section 404 any discharge that it deemed to be a discharge of fill material. The change in the agencies' regulatory approach is thus limited to the determination of *what* constitutes "fill material," not of *how* "fill material" is to be regulated.[5]

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[4] SEACC suggests that permitting the proposed discharge of mine tailings contradicts the statement in the fill rule's regulatory history that "no discharges that were previously prohibited are now authorized as a result of this rulemaking." SEACC Br. 15 (quoting J.A. 32a). From a practical standpoint, however, tailings discharges from mills—as demonstrated by the Red Dog and Fort Knox mines—had been previously authorized, as SEACC acknowledges (Br. 53), on the theory that the permitted discharges of fill material created an impoundment that constituted a "waste treatment system[]" (which no longer constituted waters of the United States).

[5] That fact also explains why SEACC's reliance (Br. 10, 14) on the example from the 1986 Memorandum of Agreement of titanium mining

Fourth, SEACC attempts to minimize the significance of EPA's 2004 memorandum (the Mine Tailings memorandum) interpreting the Act and applying the relevant regulations to the circumstances of this case. See SEACC Br. 58-60; J.A. 141a-149a. That memorandum was prepared in response to an inquiry from the Region X Office of Water regarding the applicability of Sections 402 and 404 to the proposed discharge of mine tailings from the Kensington mine into impounded waters of the United States. J.A. 141a-142a. It was signed by three Office Directors and was the product of consultation with EPA and Corps headquarters. *Ibid.* The Mine Tailings memorandum reflects EPA's effort "to provide the clarification Region X and the Alaska District are seeking" with regard to the very question presented in this case. J.A. 142a. It concludes that, because the proposed discharge of mine tailings would constitute a discharge of fill material under the plain text of the 2002 fill rule, "the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J), do not apply to the placement of tailings into the proposed impoundment." J.A. 144a-145a.

The fact that EPA provided its interpretation "through means less formal than 'notice and comment' rulemaking, does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002) (internal citation omitted). Although unpublished, the Mine Tailings memorandum is

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waste discharges as subject to Section 402 is misplaced. Under the Corps' then-prevailing definition of "fill material," mining waste did not qualify as fill material subject to Section 404 if it was discharged for waste-disposal purposes. That is no longer true, however, under the plain text of the 2002 fill rule.

part of the administrative record for the Kensington mine permits and represents the considered views of the EPA. The memorandum addresses the precise issue now before this Court; it sets forth EPA's considered understanding of its own regulations and their application to this factual setting; and it played an integral role in the inter-agency consultative process that culminated in the Corps' issuance of a Section 404 permit. It is therefore entitled to substantial if not controlling deference from a reviewing court. Cf. *Long Island Care at Home, Ltd.*, 127 S. Ct. at 2349 (treating an internal "Advisory Memorandum," written in response to litigation, as the agency's "controlling" interpretation of its own conflicting regulations); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980) (deferring to memorandum created by staff of the Federal Reserve rather than the Board, and explaining that "to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the Board and those submitted as official staff memoranda").

Contrary to SEACC's contention (Br. 58-59), the Mine Tailings memorandum is not inconsistent with EPA's prior interpretations of the Act or with statements in the preamble to the fill rule. To be sure, the preamble is no model of clarity with respect to the issue presented in this case. See Gov't Br. 35-37. But the overall import of the preamble is that discharges of "fill material," including mine tailings, would be subject to regulation under Section 404—just as the Mine Tailings memorandum concludes. See *ibid.*; J.A. 143a-145a. EPA's view that its new-source performance standard does not apply to the tailings discharge at issue here is also confirmed by the government's briefs filed in this Court. Likewise, the Corps' twice-considered, 68-page

Revised Record of Decision & Permit Evaluation supporting the grant of the Section 404 permit, notwithstanding the existence of the Section 306 limitation for mines using the froth-flotation process, confirms the Corps' agreement with EPA's interpretation. J.A. 340a-377a.

2. The 2002 fill rule represents the agencies' joint effort to demarcate more clearly the division of permitting authority between EPA (under Section 402) and the Corps (under Section 404). The agencies thus sought to alleviate the uncertainty caused by the lack of any statutory definition of "fill material" and by the agencies' prior conflicting definitions of that term. See 65 Fed. Reg. 21,292 (2000) (explaining that, before the fill rule was promulgated, "the Army and EPA definitions of 'fill material' differ[ed] from each other, and this * * * resulted in regulatory uncertainty and confusion"). The 2002 rule was designed to resolve that discrepancy and "ensure proper, consistent, and more effective regulation under the CWA." *Ibid.* The Corps and EPA chose to define the term "fill material" by reference to the likely effect of the discharge rather than the apparent intent of the discharger, explaining that, "where a waste has the effect of fill, * * * regulation under the Section 404 program is appropriate." 67 Fed. Reg. at 31,133; see Gov't Br. 30-32.

SEACC relies on a proposed exclusion from the definition of "fill material" for discharges from sources subject to EPA effluent limitations. SEACC Br. 56 (citing 65 Fed. Reg. at 21,297, 21,299). The agencies ultimately declined, however, to adopt that exclusion. Indeed, far from supporting SEACC's position, the fact that the exclusion was proposed and rejected demonstrates the agencies' intent that any discharge satisfying the definition of "fill material" would be regulated under Section 404 and would not be subject to EPA effluent limitations promulgated under Sec-

tions 301 or 306. See 67 Fed. Reg. at 31,135 ("EPA has never sought to regulate fill material under effluent guidelines.").[6]

SEACC therefore misses the point in arguing (Br. 46) that the 2002 fill rule is "merely a definition that does not, by itself, purport to authorize anything." To be sure, identification of a particular discharge as "fill material" does not, in and of itself, resolve the question of what substantive standards the discharger must satisfy in order to receive a CWA permit. Under the plain language of Sections 402 and 404, however, identification of a discharge as "fill material" does establish that the Corps rather than EPA is the appropriate permitting agency. And the statutory and regulatory scheme as a whole makes clear that the Corps' permitting decisions are governed by criteria (the Section 404(b)(1) Guidelines) that contain no reference to performance standards issued by EPA pursuant to Section 306.

The 2002 fill rule defines "fill material" as material that has "the effect of * * * [c]hanging the bottom elevation of any portion of a water of the United States," 33 C.F.R. 323.2(e)(1); 40 C.F.R. 232.2, and it defines "discharge of fill material" to include the "placement of overburden, slurry, or tailing or similar mining-related materials," 33 C.F.R. 323.2(f); 40 C.F.R. 232.2. SEACC acknowledges (Br. 46) that the definition is unambiguous, and it does not dispute

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[6] SEACC argues that giving effect to the failed exclusion for discharges subject to effluent limitations would not render meaningless the fill rule's inclusion of tailings as fill material, because certain mineral tailings are not subject to EPA effluent limitations. See SEACC Br. 57. But the regime that SEACC advocates would force dischargers that produce virtually identical waste (all of which constitutes "fill material") to examine EPA's various effluent limitations and determine whether any apply to their own mining operations—just to identify with agency has permitting authority over a particular discharge. The agencies sensibly avoided such a regime in the fill rule.

the agencies' determination that the proposed discharge of mine tailings at issue in this case constitutes a "discharge of fill material" under the regulation. Based on the discussion above, that ends the matter: under the Act, as interpreted by the Corps and EPA, any discharge that qualifies as a "discharge of fill material" is to be regulated under Section 404, not Section 402, and thus need not comply with Section 306 performance standards.

SEACC finally contends (Br. 58) that, if the fill rule renders EPA performance standards inapplicable to process-wastewater discharges like the one at issue here, the rule is invalid because the agencies failed adequately to explain their purported departure from prior enforcement practices. As explained above, however, the fill rule altered existing agency understandings only by adopting a uniform definition of "fill material" that encompassed some discharges the Corps had previously declined to regulate. The preamble to the rule acknowledged that change and fully explained the agencies' rationale for adopting the current definition. See Gov't Br. 30-32; *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'") (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996). The agencies' determination in this case that EPA performance standards are inapplicable to discharges of "fill material" did not reflect a change in policy, since EPA has never applied a Section 306 standard of performance to a discharge over which the Corps had regulatory jurisdiction under Section 404. See pp. 14-16, *supra*.

SEACC is therefore wrong in contending that the Corps' permitting decision here constitutes an unexplained

departure from prior agency practices. It is perfectly consistent with prior agency practices, with the agencies' interpretation of their statutory responsibilities under the CWA, and with the plain terms of the Act itself. And that permitting decision is therefore entitled to effect.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

DECEMBER 2008

REPLY BRIEF

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Nos. 07-984 and 07-990

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IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in Goldbelt's brief in support of petitioners remains accurate.

TABLE OF CONTENTS

I. REPLY 1

II. CONCLUSION 7

TABLE OF AUTHORITIES

Statutes

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT, § 810, 16 U.S.C. § 3120 3

CLEAN WATER ACT, § 101, 33 U.S.C. § 1251 2

CLEAN WATER ACT, § 402, 33 U.S.C. § 1342 2

CLEAN WATER ACT, § 404, 33 U.S.C. § 1344 2

ENDANGERED SPECIES ACT, 16 U.S.C. §§ 1531, *et seq.* 3

MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT, 16 U.S.C. §§ 1801, *et seq.* 3

NATIONAL ENVIRONMENTAL POLICY ACT, 42 U.S.C. §§ 4321, *et seq.* 3

Regulations

40 C.F.R. § 230.1 2

40 C.F.R. §§ 230.1, *et seq* 2

40 C.F.R. 230.10(a) 2

40 C.F.R. 230.10(c) 2

Other Authorities

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments 4

Presidential Executive Memorandum dated April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments 4

U.S. Army Corps of Engineers, Tribal Policy Principles 4

I. REPLY

Respondents Southeast Conservation Counsel, Sierra Club and Lynn Canal Conservation ("SEACC") have not opposed Goldbelt's request for affirmative relief. Accordingly, if the Court grants the relief requested by either Coeur Alaska, Inc. ("Coeur"), or the State of Alaska ("State"), it should also reverse the Ninth Circuit's decision vacating Goldbelt's Section 404 permit for the Cascade Point Marine Terminal, as described in Goldbelt's opening brief.

The Court should not be distracted by the hypothetical concerns of the Nondalton Tribal Council, et al., amici Native organizations opposed to the proposed Pebble Mine project in the Bristol Bay region of Alaska, more than 1000 miles north and west of the Kensington Mine.[1] The Tlingit Indian shareholders of Goldbelt do not take lightly the fears of Bristol Bay Natives that a large scale mining project could adversely impact their subsistence hunting and fishing activities. Similar concerns had to be addressed in planning for the Kensington Mine, which is located in the heart of Tlingit aboriginal territory. Like their Bristol Bay brethren, the Tlingit could not have supported any development that threatened use of their traditional areas for subsistence activities. J.A. 332a.

The Nondalton brief, as well as some other amici briefs filed in support of SEACC, misleadingly suggests that regulation of tailings disposal through the Corps of Engineers' ("Corps"") 404 permitting

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[1] Brief for the Nondalton Tribal Council, et al., as Amici Curiae Supporting Respondents (hereinafter referred to as the "Nondalton" brief).

program is tantamount to no regulation at all. Nothing could be further from the truth. As pointed out in the briefs of the federal agencies, Coeur and the State, the Environmental Protection Agency's ("EPA's") National Pollution Discharge Elimination System ("NPDES") permit program under Section 402 of the Clean Water Act ("CWA")[2] and the Corps' dredge and fill permit program under Section 404 of that Act,[3] while mutually exclusive, are complementary. Both are intended to implement the CWA's statutory objective to "restore and maintain the . . . integrity of waters of the United States. 33 U.S.C. § 1251. Compare 40 C.F.R. § 230.1 (purpose of 404(b)(1) Guidelines).

The 404(b)(1) Guidelines,[4] crafted by the EPA to control issuance of dredge and fill permits, are particularly well suited to address the broad range of concerns raised in the Nondalton brief. No 404 permit will be issued if the Corps finds, based on thorough testing prescribed in the Guidelines, that permitting the proposed project would cause or contribute to significant degradation of waters of the United States by, inter alia, significantly adversely affecting fish and wildlife, aquatic ecosystems, or recreational and aesthetic values. 40 C.F.R. 230.10(c). Likewise, no permit will be issued if the Corps determines that a practicable, environmentally superior alternative is available that does not require a discharge into waters of the United States. 40 C.F.R. 230.10(a).

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[2] 33 U.S.C. § 1342.

[3] 33 U.S.C. § 1344.

[4] 40 C.F.R. §§ 230.1, *et seq.*

The Corps' 404 permitting process is further constrained by a variety of interlocking environmental laws designed to insure that the concerns raised in the Nondalton brief will be considered and addressed. These requirements include, without limitation, the National Environmental Policy Act's[5] requirement for preparation of a comprehensive Environmental Impact Statement, Essential Fish Habitat review pursuant to the Magnuson-Stevens Act[6] with special emphasis on protection of anadromous fish habitat, and consultations designed to identify and protect any resident species listed under the Endangered Species Act.[7] Prior to granting any 404 permit for mining activities on federal lands, the Corps must carefully review the effect that the proposed activity may have on subsistence uses and resources pursuant to Section 810 of the Alaska National Interest Lands Conservation Act[8] and take appropriate steps to minimize adverse impacts. All of these, and more reviews – over 900 studies in total – were thoroughly documented and found acceptable by the State and federal agencies for the Kensington project.

The tribal entities joining in the Nondalton brief enjoy a government-to-government relationship with federal agencies. Their views will be entitled to special consideration in any permitting process for

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5 42 U.S.C. § § 4321, *et seq.*

6 16 U.S.C. § § 1801, *et seq.*

7 16 U.S.C. § § 1531, *et seq.*

8 16 U.S.C. § 3120, *et seq.*

the proposed Pebble Mine.[9] Indeed, the Tlingit Indians' experience throughout the permitting process demonstrates that, far from neglecting concerns such as those raised in the Nondalton brief, the federal agencies work closely and cooperatively with Native groups to address their concerns and accommodate their needs.

Throughout the Kensington permitting process the views of area Tlingit Indians were heard and respected by the federal agencies and by the permittee, Coeur, in particular. J.A. 505a ("No other company . . . has ever worked so conscientiously as Coeur to involve the Natives of northern Southeast Alaska in the planning of its activities . . . ."). The end result of the Kensington permitting process is a project that fully protects the subsistence uses and resources of Berners Bay. J.A. 332a-333a.

The federal agencies and Coeur also worked diligently to ensure that the environmentally sound Kensington Mine project provided much needed jobs to economically troubled Natives of Southeast Alaska. About 25 percent of the construction force at the Kensington Mine was Alaska Native, and Coeur has promised to continue to work with Native

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[9] Federal agencies are required to consult with their tribal counterparts prior to taking actions that may have an adverse impact on tribal interests. *See* Presidential Executive Memorandum dated April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments (http://www.hhs.gov/intergovernmental/tribal/presmemo.html); Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=16571); U.S. Army Corps of Engineers, Tribal Policy Principles (www.nwk.usace.army.mil/offices/TribalDocs/USACETribalPolicyPrinciples.pdf).

Corporations, including Goldbelt, to have them provide goods and services for Coeur's ongoing work at the Kensington Mine. As Goldbelt has explained, "[i]t would be difficult to overstate the importance of the Kensington Gold Project to the Tlingit Indians of the Juneau area." Br. in Supp. of Pet. for Writ of Cert. at 4.

The Kensington example demonstrates the ability of the Corps' 404 permitting process to take into account and protect the types of concerns raised in the Nondalton brief. Indeed, while SEACC and the other respondents question the decision to permit the Kensington Mine under Section 404 as a matter of law, they have not challenged the adequacy of any of the countless environmental reviews, or any of the specific findings made by the Corps, the Forest Service, the EPA, or the myriad other federal, state and local agencies that exhaustively evaluated the Kensington project and concluded that it would not result in substantial harm to the environment, including waters of the United States.

The Pebble project is only now in its conceptual/design stages. The necessary permits applications have yet to be filed. Assuming that the speculative description of the project in the Nondalton brief is correct, however, it is clear that there is absolutely no comparison between Pebble and the Kensington:

- If permitted, Pebble will mine a different body of ore with its own unique characteristics, employing a different mining method (open pit, as opposed to underground), in a significantly different climate and ecosystem.

- The projected volume of tailings to be disposed of at Pebble is more than 500 times larger than the estimated Kensington volume.
- The chemical composition of any process water associated with the Pebble tailings and its potential impact on fish, wildlife and aquatic ecosystems have yet to undergo exhaustive testing comparable to what was done at Kensington.
- Whereas the Kensington enjoys widespread local support among Southeast Alaska governments, businesses and Natives organizations, the Pebble project has raised statewide concerns and apparently is opposed by a broad coalition of Native governments and organizations.

Each of these factors will weigh heavily in the scales of the Corps' 404(b)(1) process and public interest review, and the many other environmental reviews by federal, state and local agencies that have yet to be conducted at Pebble. The Nondalton brief provides no reason to fear that the federal agencies will not exercise the same care they demonstrated during the Kensington permitting process in evaluating any future permitting requests for Pebble.

The assumption that a decision in favor of Coeur Alaska, Inc., in this case will result in all the speculative harm hypothesized in the Nondalton brief is belied by the experience of Southeast Alaska Natives in the Kensington process and is unwarranted. Pebble, like Kensington, will be judged on its own merits and a record that has yet to be made (and in the case of Pebble may never be

made). The facile and flawed analogy of the Pebble project to the Kensington Mine should not distract the Court from deciding the important issue on the record before it.

That record fully supports affirmation of the Section 404 permit for the Coeur Alaska Kensington tailings facility as well as the Section 404 permit for the Goldbelt Marine Terminal as environmentally sound, preferable alternatives that will finally allow the Kensington Mine to provide much needed jobs and other benefits for Alaska Natives and Southeast Alaska communities.

II. CONCLUSION

For these reason, and for the reasons set out in the briefs on the merits of Coeur, the State, and the federal respondents, the decision of the Ninth Circuit Court of Appeals should be reversed as to the federal respondents, Coeur, the State and also Goldbelt.

Respectfully submitted.

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER COEUR ALASKA, INC.

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RULE 29.6 STATEMENT

The corporate disclosure statement included in Coeur Alaska's petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT 1

I. COEUR'S TAILINGS SLURRY INDISPUTABLY IS "FILL MATERIAL" WITHIN THE MEANING OF THE FILL RULE 6

II. THE CLEAN WATER ACT AUTHORIZES THE CORPS TO PERMIT THIS DISCHARGE 12

A. The Text, Structure, And History Of The Clean Water Act Demonstrate That EPA Performance Standards Do Not Apply To Discharges Of Fill Material 13

B. EPA's Interpretation Of Its Performance Standard Resolves Any Question Whether The Corps' Section 404 Permit Would Violate Section 306(e) 20

III. THE CORPS' RIGOROUS SECTION 404 PERMITTING PROCESS ENSURED THAT THE KENSINGTON TAILINGS PLAN RESPECTS ENVIRONMENTAL VALUES 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins, 519 U.S. 452 (1997) 22

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).....4, 6

Chem. Mfrs. Ass'n v. Natural Res. Def. Council, 470 U.S. 116 (1985) 5

Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 4, 14, 19

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980).....14

Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390 (D.C. Cir. 1991) 3

HCSC-Laundry v. United States, 450 U.S. 1 (1981).....20

Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971).....18

LaRouche v. FEC, 28 F.3d 137 (D.C. Cir. 1994) 3

Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007).....9, 22

Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).....17

S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370 (2006).....16

U.S. Postal Serv. v. Gregory, 534 U.S. 1 (2001).....22

TABLE OF AUTHORITIES—CONTINUED

Page(s)

United States v. Locke,
471 U.S. 84 (1985) 6

United States v. Riverside Bayview Homes,
474 U.S. 121 (1985) 10

Statutes

5 U.S.C. § 706(2) 2, 13, 21

33 U.S.C. § 407 17

33 U.S.C. § 1251(a) 14

33 U.S.C. § 1316(e) 6, 15

33 U.S.C. § 1319 16

33 U.S.C. § 1342(a) 15, 17

33 U.S.C. § 1342(k) 15

33 U.S.C. § 1344(a) 18

33 U.S.C. § 1344(b) 15

33 U.S.C. § 1344(c) 28

33 U.S.C. § 1344(n) 16

33 U.S.C. § 1344(p) 15

Regulations

33 C.F.R. § 320.2(b) 19

33 C.F.R. § 323.2(f) 3, 6, 10

40 C.F.R. § 122.2 23

40 C.F.R. § 122.3(b) 8, 9

40 C.F.R. § 230.10(b) 16

TABLE OF AUTHORITIES—CONTINUED

Page(s)

40 C.F.R. § 230.10(c) 18

40 C.F.R. § 230.50 18

40 C.F.R. § 232.2 3

40 C.F.R. § 440.104(a) 1

40 C.F.R. § 440.104(b) 5, 25

Other Authorities

118 Cong. Rec. 33,765 (1972) 17, 18

Central Park Conservancy, Reservoir, *at* http://www.centralpark.com/pages/attractions/reservoir.html 24

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (2002) ..... passim

Hearing on Clean Water Act Definition of Fill Before the Subcomm. on Clean Air, Wetlands, and Climate Change of the S. Committee on the Environment and Public Works 7

NATIONAL PARKS SERVICE, HISTORIC AMERICAN BUILDING SURVEY, PHOTOGRAPHS: WRITTEN HISTORICAL DESCRIPTIVE DATA, WEST POTOMAC PARK 14 24

Press Release, Sierra Club, Bush Administration Allows Waste Dumping in America's Rivers and Streams (May 3, 2002) 7

TABLE OF AUTHORITIES—CONTINUED

Page(s)

The Pentagon - Facts & Figures 27

Water Pollution Control; Memorandum of Agreement on Solid Waste 51 Fed. Reg. 8,871 (1986) 9

REPLY BRIEF FOR PETITIONER COEUR ALASKA, INC.

INTRODUCTION AND SUMMARY OF ARGUMENT

SEACC's defense of the Ninth Circuit's decision is, for the most part, an exercise in misdirection. It fails to provide any persuasive rationale for the Ninth Circuit's invalidation of the Section 404 permit issued to Coeur Alaska by the Corps of Engineers in accordance with the directives of Section 404 and its implementing "Fill Rule."

SEACC begins with a blatantly misleading description of Coeur Alaska's proposed tailings discharge, suggesting that Coeur's proposed tailings slurry might pollute the impounded aquatic environment with metals or even cyanide. SEACC Br. 3–4. Yet, the Corps' record of decision reveals that "[t]here will be *no* cyanide . . . added to the milling circuit," that "the tailings will *not* be a generator of acid or heavy metals," and, indeed, that "the aluminum concentrates in the tailings [are] *less* than that in the lake sediment." J.A. 360a–61a (emphasis added).

It then resorts to word games. Even though it was happy enough to refer to Coeur's proposed discharge as "mine tailings" in its complaint, *e.g.*, J.A. 460a ¶ 2, SEACC now foists on this tailings slurry the unwieldy label, "process wastewater contain[ing] significant quantities of suspended solids," SEACC Br. 2. But it is absurd to speak of a discharge that is *55% solid* by weight in terms of "suspended solids." EPA measures "suspended solids" in milligrams per liter. 40 C.F.R. § 440.104(a) (limiting total suspended solids in drainage from gold mines to 20

mg/L). According to the Ninth Circuit (J.A. 519), Coeur's mostly solid tailings slurry contains *1.64 kilograms* of "suspended solids" per liter, a substance several orders of magnitude more "solid" than envisioned by EPA's performance standards. Whatever label SEACC might place upon it, no one disputes that Coeur's tailings slurry will raise the bottom elevation of Lower Slate Lake by 50 feet.

Finally, SEACC suggests that Coeur's diligent pursuit of a Section 404 permit masks an attempt "to escape EPA effluent limitations." SEACC Br. 44. But far from "escap[ing] EPA effluent limitations," Coeur sought and received from EPA a Section 402 permit limiting discharges of effluent *from* its tailing impoundment into downstream waters. J.A. 317a. SEACC simply refuses to come to grips with the fact that EPA has *never* regulated discharges of mine tailings *into* impounded waters of the United States.

When the subterfuge is stripped away, there is left just one legal question: Whether, by issuing a Section 404 permit in accordance with the plain language of the Fill Rule's definitions of "fill material" and "discharge of fill material," the Corps acted in a manner that is "arbitrary, capricious, [or] not in accordance with law." 5 U.S.C. § 706(2). Though the Ninth Circuit perceived no challenge to the "validity of these regulations," J.A. 541a n.12, SEACC does. It maintains that it has challenged the Fill Rule, as "interpreted" by the Corps, all along. SEACC Br. 17; *see also* SEACC's C.A. Resp. to Pets. for Reh'g *En Banc* 12 ("SEACC does not challenge this regulation (unless it is misinterpreted to conflict with the Clean Water Act)").

It is not immediately clear that administrative law embraces an "as interpreted" challenge to a regu-

lation where, as here, that regulation is conceded to be a facially valid interpretation of the underlying statute. *See LaRouche v. FEC*, 28 F.3d 137, 141 (D.C. Cir. 1994) ("There is a one-word response to these arguments: '*Chevron*.'"). Nor is it clear that such a challenge differs in any meaningful respect from a challenge to the agency's interpretation of its regulation *simpliciter*. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395 (D.C. Cir. 1991) (suggesting that an agency's interpretation of its own regulation "must also meet the test of consistency with the underlying statute"). Regardless, SEACC's challenge plainly fails on its own terms.

In analyzing SEACC's "as interpreted" challenge to the Fill Rule, the first question, logically, is whether the Corps, in issuing a permit for Coeur's proposed discharge, has reasonably interpreted its own Fill Rule. The Fill Rule defines "discharge of fill material" to include specifically "overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2. Though SEACC concedes that regulation is "not ambiguous," and, indeed, even that Coeur's discharge "meet[s] [its] definition of 'fill material,'" SEACC Br. 20, 46, it nevertheless contends that the history of the Fill Rule demonstrates that the Corps and EPA did not intend the Fill Rule to encompass mine tailings produced by an industrial source subject to EPA effluent restrictions. *See id.* 55–57.

SEACC's reading of that regulatory history is dubious, and its contention that EPA and the Corps did not intend their Fill Rule to permit the discharge of Coeur's type of mine tailings is flatly contradicted

by numerous pre-litigation complaints that the Fill Rule would do just that.

But even if the regulatory history were exactly as SEACC now describes, its concession that the Fill Rule is "not ambiguous" would be fatal to its argument. The law is clear that if an agency's interpretation is consistent with "the plain words of the regulation," that is the end of the matter. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Here, the Corps' interpretation of the regulation is not merely consistent with the "plain words" of the Fill Rule, but commanded by it. The Corps' interpretation of the regulation therefore must be given "controlling weight." *Id.*

SEACC's next and principal contention—that the Corps' interpretation of the Fill Rule violates the Clean Water Act by permitting a discharge that Section 306(e) prohibits—also lacks merit. SEACC acknowledges that the analysis of its statutory claim must be guided by the framework of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984). SEACC Br. 20. Because it advances no argument that the Corps' interpretation fails under *Chevron*'s second step, SEACC can prevail only if "Congress has directly spoken to the precise question at issue" and resolved it in SEACC's favor. *Chevron*, 467 U.S. at 842.

Here, the "precise question at issue" is whether Congress intended discharges of "fill material" described in Section 404 to be regulated by the Section 404(b)(1) guidelines, or rather, at EPA's option, by effluent restrictions promulgated by EPA as part of the National Pollution Discharge Elimination System ("NPDES") set out in Section 402. The "traditional tools of statutory construction" (*Chevron*, 467

U.S. at 843 n.9), point overwhelmingly to the conclusion that Congress intended "fill material" to be regulated by the Corps under Section 404, subject to the water-quality requirements developed by EPA under Section 404(b)(1) and to EPA's permit veto power under Section 404(c).

At most, the assertedly categorical nature of Section 306(e)'s prohibition creates an ambiguity in "this very 'complex statute.'" *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125 (1985). For more than thirty years, EPA and the Corps have interpreted the Act to grant the Corps jurisdiction over any discharge that satisfies the prevailing regulatory definition of "fill material," and to grant EPA jurisdiction over discharges of all other pollutants. SEACC's absence of contrary argument effectively concedes that, if the Act is ambiguous, the longstanding regulatory division of labor reflected in the Fill Rule is a permissible means of resolving that ambiguity.

But even if the Act rejected that regulatory division of labor and unambiguously required the Corps to cede its Section 404 authority to regulate discharges of "fill material" whenever EPA sought to regulate such a discharge through an effluent restriction, SEACC still could not prevail in this case. SEACC's argument that the Corps' "fill material" permit violates Section 306(e) is predicated on its assertion that the "discharge from the Kensington mine's beneficiation mill is prohibited by a new source performance standard adopted by EPA"—specifically, EPA's performance standard for process wastewater from gold froth-flotation mills, 40 C.F.R. § 440.104(b)(1). SEACC Br. 20. But EPA, the agency charged with promulgating, administering,

and enforcing that performance standard, plainly disagrees, concluding that "effluent limitations guidelines and standards, such as those applicable to gold ore mining . . . *do not apply* to the placement of tailings into the proposed impoundment." J.A. 144a–45a (emphasis added).

There accordingly was no basis for the Ninth Circuit's conclusion that Coeur's proposed discharge would be "in violation of [EPA's] standard of performance," 33 U.S.C. § 1316(e), much less its conclusion that the Corps acted "not in accordance with law" when it abided by EPA's interpretation of the scope of its own effluent restriction.

I. COEUR'S TAILINGS SLURRY INDISPUTABLY IS "FILL MATERIAL" WITHIN THE MEANING OF THE FILL RULE

The Ninth Circuit held that the Corps unreasonably interpreted the Fill Rule's definition of "discharge of fill material"—defined by EPA and the Corps to include specifically placement of "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f)—to encompass Coeur's proposed placement of a tailings slurry. J.A. 546a–47a. With no answer to the "the plain words of the regulation," *Seminole Rock*, 325 U.S. at 414, or the axiom that where language "is plain and the agency's construction completely consistent with that language, the agency's construction simply cannot be found 'sufficiently unreasonable' as to be unacceptable," *United States v. Locke*, 471 U.S. 84, 96 (1985)—indeed, SEACC concedes that Coeur's tailing slurry "meet[s] the agencies' definition of fill material," SEACC Br. 20—SEACC defends the Ninth Circuit's conclusion with a subtle twist on that court's reasoning.

Where the Ninth Circuit held that the Corps' issuance of a permit to Coeur contravened "dispositive" "regulatory history," J.A. 547a, SEACC now contends that the preamble to the Fill Rule essentially applied a narrowing construction to the regulation's textual definitions of "fill material" and "discharge of fill material" that excludes any discharge from sources regulated by EPA effluent restrictions, and that the Corps' unreasonably deviated from that narrowing construction by permitting Coeur's discharge.

This supposed narrowing construction must have been quite obscure because SEACC did not assert its existence until several years after the regulation was promulgated. Quite the contrary, when the Fill Rule was first promulgated, respondent Sierra Club decried the fact that the new Fill Rule allowed Section 404 permits for the discharge of "hardrock mining waste."[1] And one month later, SEACC's counsel of record, Earthjustice, testified before a Senate subcommitee and complained that the new Fill Rule would allow mining companies "to apply for a § 404 'fill' permit from the Corps . . . *even if the waste to be discharged has an effluent limitation and would otherwise be regulated under § 402 of the law*."[2]

In fact, as the pre-litigation statements of the Sierra Club and their counsel suggest, the preamble to

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[1] *See* Press Release, Sierra Club, Bush Administration Allows Waste Dumping in America's Rivers and Streams (May 3, 2002), http://www.commondreams.org/news2002/0503-11.htm.

[2] *Hearing on Clean Water Act Definition of Fill Before the Subcomm. on Clean Air, Wetlands, and Climate Change of the S. Committee on the Environment and Public Works*, http://epw.senate.gov/107th/Mulhern_060602.htm (2002) (statement of Joan Mulhern, Senior Legislative Counsel, Earthjustice Legal Defense Fund) (emphasis added).

the Fill Rule does not include the narrowing construction on which SEACC now relies. SEACC zeroes in on statements that the rule "is generally consistent with current agency practice" and "generally is intended to maintain our existing approach," SEACC Br. 12, 13 (quoting Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,129, 31,133, 31,135 (2002)), and claims that they demonstrate that EPA and the Corps did not intend (plain language of their regulation notwithstanding) to allow the Corps to permit this discharge. *See* SEACC Br. 56. They argue that because Coeur's tailings slurry likely would not have been deemed by the Corps to be Section 404 fill material under its previous purpose-based test, the agencies' disclaimer of "any intention to change their existing practice," must mean that they did not intend to change their characterization of—and the regulatory regime applicable to—Coeur's discharge. *Id.*

But the "approach" and "practice" that the agencies sought to maintain was not the then-uncertain boundaries of the Corps' Section 404 permit program; it was the agencies' longstanding use of the regulatory definition of "fill material" as the line of demarcation between the Corps' permit program and EPA's. For decades, EPA had recognized that "[d]ischarges of dredged or fill material . . . which are regulated under section 404" "do not require NPDES permits." *See* 40 C.F.R. § 122.3(b). Accordingly, even under the 1986 MOA, discharges of fill material that met the Corps' definition of fill material "remain[ed] subject to section 404 even if they occur[red] in association with discharges of waste meeting the criteria in the agreement for section 402 discharges." *See* Water Pollution Control; Memoran-

dum of Agreement on Solid Waste, 51 Fed. Reg. 8,871, 8,871 (1986).[3]

The preambular statements on which SEACC places most reliance are located within the agencies' explanation of their decision to "*delete*[] the exclusion contained in the proposal for discharges covered by effluent limitation guidelines or standards or NPDES permits." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added). It was in that context that the agencies explained that eliminating the exclusion would not "alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs" because "EPA has *never* sought to regulate fill material under effluent limitation guidelines." *Id.* (emphasis added). Retaining the proposed exclusion, on the other hand, "would result in uncertainty with respect to the regulation of certain discharges." *Id.* Indeed, the agencies' response to comments suggests that the exclusion was deleted specifically because it "could inadvertently result in attempts by regulators . . . to have discharges excluded from section 404 coverage simply due to the presence of constituents in the material

[3] SEACC argues that the absence of a comma in 40 C.F.R. § 122.3(b) implies that "some 'fill material' discharges are *not* regulated under Section 404" and remain subject to regulation under Section 402. SEACC Br. 47. Whatever one's assessment of SEACC's view of "proper grammar," *id.* 48, it is clear that EPA has never subscribed to it. *See* Fed. Resp'ts Br. 27; *see also* J.A. 74a ("under the existing EPA definition, material that has the effect of fill, regardless of the purpose of the discharge, is deemed fill material, and as such is not regulated under the Section 402 program"). EPA's interpretation of its regulation is not remotely "plainly erroneous," and, therefore, is controlling. *See Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007).

for which effluent guidelines exist" such as "mine drainage or process waste water." J.A. 45a–46a.

Rather than introduce confusion into a regulation designed to produce clarity, the agencies decided to delete the exclusion and "maintain [the] existing approach" with EPA "never" regulating discharges that satisfy the Corps' definition of fill material. Final Revisions, 67 Fed. Reg. at 31,135. SEACC cannot through this litigation "reintroduce[] into the regulation precisely what the Corps had excised," *United States v. Riverside Bayview Homes*, 474 U.S. 121, 130 (1985), particularly when to do so would upend the regulatory paradigm the Corps and EPA have jointly followed since 1973.

Although the Fill Rule did not alter the agencies' use of the regulatory definition of "fill material" as the dividing line between the Corps' and EPA's regulatory programs, it did quite clearly change the definition of "fill material." In order to "ensure a clear, effective, and consistent regulatory approach with regard to materials that have the effect of fill," the agencies reconciled their conflicting definitions of "fill material" by adopting EPA's effects-based test, and "provid[ed] a single consistent definition of the terms 'fill material' and 'discharge of fill material.'" J.A. 73a. In the final rulemaking, the agencies amended the definition of "discharge of fill material" to include explicitly "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f), to "clarify that *any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material,'" Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

But even this change in the definition of "fill material" did not materially "expand the *types* of dis-

charges that will be covered under section 404," Final Revisions, 67 Fed. Reg. at 31,133 (emphasis added), because, as the agencies explained when responding to comments on the proposed rule, "mining by-products such as those resulting from mining beneficiation or ... processing ... may have a slightly different physical form from the traditional rock and soil used as fill material, but ... can have the same effect on the aquatic environment." J.A. 92a–93a. Moreover, under the Section 404(b) guidelines, the applicant is required to "demonstrat[e] that there are no less damaging alternatives to the discharge, and that all appropriate and practicable steps have been taken to avoid, minimize and compensate for any effects on the waters." Final Revisions, 67 Fed. Reg. at 31,133.[4]

Thus, while the Fill Rule clarified and shifted slightly the line of demarcation between the Corps' and EPA's permitting programs (and explained that policy shift at length), it did not change in any way the method by which that line is drawn. Now, as since 1973, it is drawn solely by reference to the regulatory definition of fill material. If the Corps determines that a discharge satisfies its definition of fill material, the discharge is regulated by the Corps

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[4] SEACC claims that the agencies "not[ed] that mine tailing discharges subject to effluent limitations would remain so and that section 402 permits would still be needed for 'process water' discharges." SEACC Br. 56. SEACC must be referring to the agencies' statement that "if EPA has previously determined that certain materials are subject to an ELG under specific circumstances, then that determination remains valid." J.A. 48a. But, under the "specific circumstances" of this case, EPA has determined that its effluent restrictions "do *not* apply to the placement of tailings into the proposed impoundment." *Id.* 145a (emphasis added).

under Section 404, in accordance with the water-quality requirements set forth in the Section 404(b)(1) guidelines and subject to EPA's permit veto under Section 404(c). "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

SEACC's suggested preambular narrowing construction of the Fill Rule is entirely a figment of its zealous advocacy—a reflection of what the Fill Rule might have looked like if the agencies had adopted rather than rejected the suggestions made by SEACC and the Sierra Club in their comments on the proposed rule. The plain language of the Fill Rule stands on its own, and there is no serious dispute that Coeur's tailings slurry satisfies its definitions of "fill material" and "discharge of fill material." The Corps and EPA reasonably interpreted its Fill Rule in making that determination.

II. THE CLEAN WATER ACT AUTHORIZES THE CORPS TO PERMIT THIS DISCHARGE

Abandoning any reliance on Section 301 of the Act, (what once was featured argument, *see* SEACC C.A. Br. 34, is now, belatedly, a "sideshow," *see* SEACC Br. 38), SEACC rests its statutory argument on a single contention: that the Corps' issuance of a Section 404 permit for Coeur's tailing slurry violates the Clean Water Act by permitting a discharge that Section 306(e) allegedly prohibits. That argument fails for at least two independent reasons. First, as the Corps and EPA have recognized for decades, the text, structure, and history of the Act demonstrate that even "zero discharge" Section 306 performance standards do not apply to discharges of fill material. But even if SEACC were correct that, as a general matter, Section 306 performance standards can ap-

ply to discharges of fill material and thereby displace the Corps' regulatory authority over such discharges, the Corps' issuance of its permit here to Coeur still would be "in accordance with law," 5 U.S.C. § 706(2), because EPA itself has determined that Coeur's placement of a tailings slurry into an impoundment does not violate its froth-flotation performance standard, J.A. 145a–46a. The Corps could not, "in accordance with law," reject EPA's interpretation of its own performance standard to deny Coeur the permit to which SEACC concedes it is otherwise entitled.

A. The Text, Structure, And History Of The Clean Water Act Demonstrate That EPA Performance Standards Do Not Apply To Discharges Of Fill Material

On SEACC's and the Ninth Circuit's view, if EPA promulgated Section 306 performance standards for all discharges of "fill material" from every manner of industrial and municipal source, those *regulations* would strip the Corps of its *statutory* authority over discharges of fill material and would require that all such discharges "be permitted, if at all, under section 402, not section 404." SEACC Br. 37–38. This view of the statutory scheme cannot be reconciled with its text, structure, or history and, therefore, must be rejected.

SEACC places great weight on its view of the *purposes* of the Clean Water Act, arguing that the agencies' conclusion that EPA effluent restrictions do not apply to discharges of fill material is "highly unlikely given the Act's purpose[]" of meeting a non-binding "goal that the discharge of pollutants into the navigable waters be eliminated by 1985." SEACC Br. 30; 33 U.S.C. § 1251(a)(1). Achieving

that one of the Act's numerous legislative objectives, however, was manifestly not the purpose of *Section 404* and its grant of authority to the Corps to issue permits for discharges of fill material. In any event, this Court has made clear that it is the agencies charged with a statute's administration—not courts—that are best positioned to ascertain the "full understanding of the force of the statutory policy in the given situation." *Chevron*, 467 U.S. at 844. Here, as in the Truth in Lending Act, "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." *See also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

The "traditional tools of statutory construction"—text, structure, and history—all support the expert agencies' considered and longstanding interpretation of the statutory scheme as granting the Corps' jurisdiction over all discharges it reasonably determines to be "fill material." Conversely, none of the traditional tools remotely supports (much less unambiguously requires) the Ninth Circuit's construction of the Act, under which fill material is subject to the Corps' jurisdiction only to the extent that EPA chooses not to regulate it.

1. SEACC's principal argument is that Section 306(e) amounts to an "absolute prohibition[]," allowing no discharge in excess of EPA's performance standards. SEACC Br. 24. This is true as far as it goes—SEACC is right that Section 306(e) itself "contains no exceptions." *Id.* But as SEACC elsewhere concedes, if "section[] [306] has no application to a particular discharge, then the discharge cannot be in violation of it." *Id.* 39. Because Section 306(e) does not of its own force "prohibit[]" *any* particular dis-

charge—rather, it works in conjunction with "applicable" EPA performance standards and bans discharges "in violation of" those effluent restrictions, 33 U.S.C. § 1316(e)—Section 306 *itself* cannot answer the question whether Congress intended for Section 306 to apply to discharges of fill material. Sections 402 and 404, however, make clear that it did not.

SEACC acknowledges that the Act sets up two separate regimes for regulating discharges into waters of the United States, with discharges of "one type of pollutant, dredged or fill material," regulated by the Corps under Section 404, and discharges of all other pollutants regulated by EPA under Section 402's NPDES program. SEACC Br. 7. And SEACC readily admits that Congress "wr[ote] the two provisions differently": Under the NPDES program, discharges must comply with EPA "effluent limitations under sections 301 [and] 306," and, under Section 402(k), compliance with an NPDES permit is deemed compliance with those statutes. *Id.* 37; *see also* 33 U.S.C. § 1342(a), (k). "In contrast," under the Section 404 program, discharges of fill material are explicitly regulated according to a *different* set of EPA water-quality requirements, "the 404(b) guidelines," and, under Section 404(p), compliance with a Section 404 permit is deemed compliance with those water-quality requirements. SEACC Br. 37; *see also* 33 U.S.C. § 1344(b), (p).

This is no "implied exception[]" to Section 306's general prohibition on discharges that violate EPA performance standards. SEACC Br. 31. It is a clear and specific directive from Congress that discharges of fill material be regulated, not under ill-fitting performance standards, but under an entirely different set of substantive standards—the Section 404(b)(1)

guidelines, developed by EPA in consultation with the Corps—subject to EPA's authority under Section 404(c) to veto permits as it deems appropriate.[5]

SEACC refuses to accord any significance whatsoever to Congress's disparate treatment of fill material and other pollutants. But just two terms ago, this Court made clear that, in interpreting the Clean Water Act, courts must presume that "Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006). SEACC suggests no persuasive textual or structural rationale for declining to give effect to Congress's "intentional[] and purpose[ful]" decision to regulate discharges of fill material under the Section 404(b)(1) guidelines.[6]

2. The legislative history of Section 404 strongly supports the conclusion that Congress intended for discharges of fill material to be regulated by the Corps, under standards specifically tailored to the environmental concerns unique to discharges of fill

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[5] It is true, as SEACC says (at 27), that, under the regulations establishing the Section 404(b)(1) guidelines, "the Corps must comply with other applicable laws in issuing or denying section 404 permits," *see* 40 C.F.R. § 230.10(b) (requiring compliance with, inter alia, Endangered Species Act), but SEACC fails to mention that Section 306 is *not* one of those "applicable laws."

[6] Section 404(n) is not a sufficient justification. *Contra* SEACC Br. 27–28. Section 404(n) simply saves EPA's broad authority, under Section 309 of the Act, to enforce effluent restrictions and permit conditions. *See* 33 U.S.C. § 1344(n). Nothing in Section 309 makes Section 306 performance standards applicable—or not—to particular discharges. *See id.* § 1319.

material, rather than by EPA under performance standards fundamentally incompatible with dredge and fill activities.

SEACC has no response whatsoever to the legislative history of Section 404. *See* Coeur Br. 29–31. It has nothing to say concerning the debate in Congress over whether dredge and fill activities historically regulated by the Corps should be regulated by EPA, and no alternative explanation for the compromise that emerged under which the Corps would retain primary jurisdiction over discharges of dredge and fill material, but EPA would play a significant oversight role through its development of the Section 404(b)(1) guidelines and its veto authority. Indeed, even the letter from Administrator Ruckelhaus that SEACC points to as authority (at 41–42), recognized that under the enrolled bill, "[t]he Corps shall continue to issue dredge and fill permits in accordance with criteria comparable to the EPA ocean discharge criteria"—which is to say, the Section 404(b)(1) guidelines. 118 Cong. Rec. 36,777 (1972).

SEACC instead relies on three Senators' fleeting references to litigation surrounding the Reserve Mining Company's discharge of a mostly liquid (98.5 percent) tailings slurry into Lake Superior. *See Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975). At the time Congress was considering the Act, Reserve had pending before the Corps an application for a discharge permit under the Refuse Act. *See* 33 U.S.C. § 407. SEACC argues that Congress's decision to convert over 20,000 pending Refuse Act permit applications into NPDES applications, *see* 33 U.S.C. § 1342(a)(5), reflects an intention that all discharges of mine tailings similar to Reserve's be

regulated by EPA under its NPDES program. *See* SEACC Br. 42–44.

As a initial matter, other than the fact that it was produced by a beneficiation mill, Reserve's discharge bears no resemblance whatsoever to Coeur's. If proposed today, Reserve's discharge could not be permitted under Section 404 for at least three reasons: (1) the unimpounded waters of Lake Superior would not qualify as a "specified disposal site," 33 U.S.C. § 1344(a); (2) the discharge of a 98.5-percent-liquid slurry likely would not raise Lake Superior's bottom elevation; and (3) the Section 404(b)(1) guidelines do not permit discharges that jeopardize drinking-water resources, *see* 40 C.F.R. §§ 230.10(c)(1), 230.50.

But even if Reserve's discharge were similar to Coeur's, SEACC's argument still would fail because Section 402(a)(5) and its scant legislative history cannot bear the weight SEACC places upon it. If the legislative record says anything at all about Section 402(a)(5), it suggests only that Section 402(a)(5) was intended to resolve, with minimal administrative burden, "the unbelievable mess" resulting from the backlog of over 20,000 discharge permit applications that had accumulated since the Corps' Refuse Act regime had been judicially invalidated. 118 Cong. Rec. 33,765 (statement of Rep. Clark); *see also Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) (invalidating Corps' Refuse Act regulations). Nothing in the congressional debates even remotely suggests Congress intended Section 402(a)(5) to fix for all time the regulatory regime to be applied to Reserve's discharge or any other discharge previously permissible under the Refuse Act. And, indeed, nothing in Section 402(a)(5) precluded Refuse Act applicants from seek-

ing permits for their discharge under other provisions of law, including Section 404. Section 402(a)(5) thus hardly can be considered evidence that Congress considered the question precisely at issue here, much less resolved it in SEACC's favor.[7]

3. In short, all the traditional tools of statutory construction point in one direction: toward the conclusion that Congress intended that discharges of fill material be regulated by the Corps according to the Section 404(b)(1) guidelines rather than by EPA, according to its Section 306 performance standards. SEACC makes much of the absence of explicit statutory language making clear that EPA performance standards do not apply to discharges of fill material. *See* SEACC Br. 33. But the *absence* of such explicit language would mean, at most, that Congress was *silent* on the specific issue of how Section 404's authorization and Section 306(e)'s prohibition interrelate. Where a statute is silent, a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by administrator of an agency." *Chevron*, 467 U.S. at 843–44.

There can be no doubt that the Corps' and EPA's longstanding joint interpretation of the statutory scheme—that discharges satisfying the Corps' definition of "fill material" are regulated by the Corps un-

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[7] Nor did Section 402(a)(5) implicitly limit "fill material" to the "'work' or 'structures' in navigable waters" permitted "under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403." SEACC Br. 41. That would have made the Corps' Section 10 permit program obsolete, yet it remains active today. *See* 33 C.F.R. § 320.2(b). It also would have authorized fill material permits without reference to the applicability of EPA performance standards and thus defeated SEACC's argument here.

der Section 404, and "never" by EPA under effluent guidelines—is reasonable. SEACC essentially concedes the point when it urges the Court to "defer to the reasonable interpretation of the Act adopted by EPA and the Corps when they adopted the [Fill Rule]." SEACC Br. 46. And rightly so, for an agency's interpretation of an ambiguous statute surely falls within the wide range of permissible constructions when it is consistent with (if not required by) the "basic principle of statutory construction that a specific statute . . . controls over a general provision"—a principle that applies with particular force when two statutory provisions are "interrelated and closely positioned, both in fact being parts of" a single statutory scheme. *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981). Here, it cannot be seriously disputed that Section 404 is more specific to the regulation of discharges of fill material than the "blanket prohibition[]" of Section 306(e) that assertedly applies to "*any*" and "*all*" discharges. J.A. 532a, 530a. Any ambiguity lurking within the Act on the question whether particular discharges of fill material are to be regulated under the Section 404(b)(1) guidelines or EPA performance standards has been jointly, reasonably, and continuously resolved by the Corps and EPA by reference to the regulatory definition of fill material.

B. EPA's Interpretation Of Its Performance Standard Resolves Any Question Whether The Corps' Section 404 Permit Would Violate Section 306(e)

Even if SEACC's interpretation of the Act were correct, it would not follow that the Corps' issuance of a discharge permit to Coeur was "not in accordance with law." 5 U.S.C. § 706(2)(A). SEACC's con-

tention that Coeur's discharge of fill material violates Section 306(e) hinges on its assertion that Coeur's proposed discharge would violate EPA's froth-flotation performance standard. EPA, however, expressly determined otherwise.

In response to inquiries concerning "Clean Water Act . . . regulation of . . . discharges of mine tailings from the proposed Kensington Mine," but before SEACC initiated this litigation, EPA's Office of Water published an authoritative memorandum that concluded that "effluent limitations guidelines and standards, such as those applicable to gold ore mining (*see* 40 C.F.R. Part 440, Subpart J) *do not apply* to the placement of tailings into the proposed impoundment." J.A. 144a–45a (emphasis added).[8] And in its brief to this Court (which was signed by EPA, in addition to the respondent agencies), the government has reaffirmed that position. *See* Fed. Resp'ts Br. 28, 41. In the absence of any challenge to EPA's agency action—SEACC did not name EPA as a defendant—EPA's determination is presumed valid and must be regarded as controlling of the question whether Coeur's discharge of fill material would violate EPA's performance standard. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("a presump-

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[8] Instead, consistent with the statute, its own regulations, and long-standing practice, EPA determined that such performance standards would apply to any effluent discharged *from* the impoundment into downstream waters, and be regulated at that point under Section 402. J.A. 144a–45a. Contrary to SEACC's suggestion, upholding Coeur's Section 404 permit will not nullify froth-flotation and other performance standards; EPA will continue to apply such standards to discharges *from* tailings impoundments.

tion of regularity attaches to the actions of Government agencies").

Even if SEACC had challenged EPA's determination, this Court still would have to defer to EPA's interpretation of its own performance standard unless it was "plainly erroneous or inconsistent with the regulation." *See Long Island Care*, 127 S. Ct. at 2349 (according deference to internal department memorandum); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (according deference to interpretation stated in legal brief). SEACC cannot possibly sustain that burden; EPA's conclusion that its performance standard for process wastewater does not apply to discharges of fill material is unassailable.

Indeed, SEACC implicitly concedes the point. In attempting to distinguish the Red Dog and Fort Knox mines, SEACC acknowledges that, in both instances, mine tailings were placed in jurisdictional waters and wetlands to build impoundment structures. SEACC Br. 53. SEACC offers that "[d]ewatered tailings are sometimes used as a construction material in dams at mines," *id.* at 53 n.16, but what SEACC fails to explain is that—particularly in southeast and other wet areas of Alaska—mine tailings can never be completely "dewatered." *See* Pacific Legal Foundation, *et al.*, *Amicus Curiae* Br. 17. Even after energy-intensive drying processes, measurable amounts of "process wastewater" will remain entrained in the largely solid tailings. *See* J.A. 192a ("tailings would be dewatered . . . to a moisture content of 5 to 18 percent"). If, as SEACC has asserted, the presence of *any* amount of water in contact with mine tailings allows SEACC to label the mixture "process wastewater with significant quantities of suspended sol-

ids" and subjects that discharge to EPA effluent restrictions, then the Corps could not have permitted the discharge of the "[d]ewatered tailings" at Red Dog or Fort Knox.[9]

The applicability of EPA effluent restrictions to mine tailings cannot turn on the extent to which they are "dewatered." It instead turns, as it always has, on whether the discharge satisfies the regulatory definition of fill material—whether the Corps' previous purpose-based definition applicable when the Red Dog impoundment was constructed, or the Fill Rule's effects-based definition applicable to Coeur's tailings slurry today.

III. THE CORPS' RIGOROUS SECTION 404 PERMITTING PROCESS ENSURED THAT THE KENSINGTON TAILINGS PLAN RESPECTS ENVIRONMENTAL VALUES

SEACC tars Coeur's tailings slurry as toxic and chemically harmful to the environment, but Coeur's mine tailings will change Lower Slate Lake in exactly the same manner as a discharge of "clean" dirt: they will cover the bottom of the lake. This discharge of fill material will have real impacts—it will raise the bottom elevation of the lake by 50 feet and

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[9] SEACC suggests that the placement of mine tailings for the Red Dog and Fort Knox mines was permitted only because those impoundments were deemed non-jurisdictional "waste treatment systems." SEACC Br. 53–54; *see also* 40 C.F.R. § 122.2 (providing that "waste treatment systems" are "not waters of the United States"). But the tailings used *to build* the impoundment structures indisputably were placed in jurisdictional waters, which is why their placement required a Section 404 permit. And as explained by EPA, the Fill Rule regulates tailings discharges *into* impoundments more effectively than the waste-treatment-system provision does. J.A. 145a–46a.

nearly triple its surface area—but these are exactly the type of impacts that the Corps has long been charged with evaluating. Using this expertise, the Corps—acting in consultation with numerous other federal and state agencies—evaluated Coeur's tailings alternatives under the Section 404(b)(1) guidelines and correctly determined that the placement of the Kensington tailings in Lower Slate Lake was the "least environmentally damaging practicable alternative." J.A. 354a. This process, and the EPA's authority to veto the permits it produces, demonstrates that the Ninth Circuit's strained reading of the Act and its rewriting of the Fill Rule is, aside from being incorrect, unnecessary.

Lower Slate Lake is one of an abundance of similarly-sized, isolated ponds in Southeast Alaska. Covering only 23 acres, it is approximately one-fifth the size of the Potomac Tidal Basin or the Reservoir in New York City's Central Park.[10] Though relatively small in surface area, Lower Slate Lake is unusually deep—so deep that only the top half of the lake can sustain aquatic life. J.A. 134a, 137a. The unproductive depths of the lake are a site where the large quantity of tailings inevitably produced by a hardrock mining operation like Kensington can be stored with minimal environmental impact.

The Corps-approved plan to impound and fill in the unproductive portion of the lake is equivalent to

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[10] *See, e.g.*, NATIONAL PARKS SERVICE, HISTORIC AMERICAN BUILDINGS SURVEY, PHOTOGRAPHS: WRITTEN HISTORICAL DESCRIPTIVE DATA, WEST POTOMAC PARK 14, *available at* http://lcweb2.loc.gov/pnp/habshaer/dc/dc0800/dc0802/data/dc0802.pdf (107 acres); Central Park Conservancy, Reservoir, *at* http://www.centralpark.com/pages/attractions/reservoir.html (106 acres).

those it previously approved as "specified disposal sites" under Section 404 for the Red Dog and Fort Knox mines. *Compare* J.A. 360a–61a, *with* C.A. J.S.E.R. 1097, 991. The plan authorizes an impoundment in jurisdictional waters for the storage of mine tailings, with the naturally flowing waters diverted around the impoundment. Tailings are placed into the impoundment in a slurry form, and water is recycled back to the mill via a return pipeline. *Id.* 293a–94a. *See* Pacific Legal Foundation *Amici Curiae* Br. 14 (diagram). Discharges *from* the impoundment are strictly regulated under EPA's Section 402 NPDES permit program. As provided under the "zero discharge" performance standard, Coeur's Section 402 permit limits the discharges from the tailings impoundment to an amount equivalent to naturally occurring "net precipitation," *see* 40 C.F.R. § 440.104(b), and requires even that limited amount of water to be treated prior to discharge, J.A. 294a, 373a.

Contrary to SEACC's suggestions, the tailings slurry placed *into* the impoundment is fundamentally inert. The Corps found that "the aluminum concentrates in the tailings [are] less than that in the lake sediment" and there is "a low potential for chromium to be a risk to aquatic life." J.A. 361a. While elevated pH levels in the immediate vicinity "around the discharge pipe" likely would be harmful to aquatic life in that vicinity, fish will naturally avoid the area of higher pH, C.A. E.R. 370, and the elevated pH levels will "dissipate very rapidly," J.A. 360a (Corps Revised ROD). As for the other chemicals and minerals added to the tailings slurry, the district court found (correctly) that they "are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the set-

tling of the fine material." *Id.* 482a. If aquatic plant or fish life is lost, it will be because the tailings covered the plant life—a natural and necessary consequence of the filling of wetlands or most bodies of water—which, in turn is the food source for the resident fish. *Id.* 129a, 361a. After remediation, the lake is expected to "provide at least equivalent aquatic habitat and productivity as it does currently." *Id.* 484a.[11]

While disposing of the tailings in Lower Slate Lake will *increase* the size of the lake and cause only temporary aquatic losses, any upland storage of the tailings in a dry stack configuration would result in a *permanent loss* of substantial acres of wetlands. J.A. 365a–66a. The first step in creating a dry stack would be to fill in anywhere from 34 to 113 acres of wetlands with "clean" rock and dirt (fill that although purchased from a local quarry likely would be substantially similar in composition to Coeur's mine tailings)—a permanent wetlands loss that is up to five times the size of Lower Slate Lake. C.A. J.S.E.R. 859–61. The tailings would then be dried to the extent possible and stacked on top of the non-jurisdictional filled wetlands. J.A. 192a–93a.

The resulting dry stack would be "highly visible from Lynn Canal, the only Visual Priority Travel Route (VPTR) impacted by project components." J.A.

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11 "[A] non-diverse, sparsely populated, assemblage of small fish," specifically approximately 1,000 fresh-water Dolly Varden char and an undetermined number of three-spine stickleback, may be lost as a result of the filling of the lakebed. J.A. 129a, 197a–98a. These fish are not threatened species, nor, according to the Corps' Section 404(b)(1) Guidelines Evaluation, are there any endangered or threatened species in Lower Slate Lake. *See Id.* 381a, 392a.

220a. It would reach from 150 to 200 feet high, C.A. E.R. 327, and would extend, depending on which option were used, from 1200 to 2000 feet in both width and length, C.A. J.S.E.R. 669–70. The dry stack facility would dwarf the Pentagon, standing twice as high and potentially covering almost three times as many acres. *See* The Pentagon - Facts & Figures, *at* http://pentagon.afis.osd.mil/facts-area.html (77 feet tall and 34 acres in area).[12]

As part of the Section 404(b)(1) review of these competing alternatives, the Corps concluded that Coeur's proposed aquatic tailings impoundment was environmentally preferable to any dry stack alternative. J.A. 366a. Specifically, the Corps concluded that, after reclamation, the lake will become a "functioning emergent wetland/vegetated shallows lake complex, including 15 acres of emergent wetland/vegetated shallows as part of a 62 acre lake, [that] is more valuable to the aquatic ecosystem than a permanently filled wetland . . . that has lost all aquatic functions and values." *Id.* 361a. As detailed by *amicus curiae*, this evaluation process, in which EPA retains a significant oversight role, is thorough, site-specific, and fully addresses environmental considerations. *See* Nat'l Ass'n of Homebuilders *Amicus Curiae* Br. 17–32. And on top of that, Congress has

[12] The "paste" tailings alternative referenced by SEACC (at 19) is not described in the record because it was first considered only after the decision of the court of appeals. It shared many of the same environmental flaws as the dry stack alternative; the principal difference was the consistency of the tailings. SEACC Opp'n to Pets. for Writ of Cert. 10. Coeur terminated the permitting process for a paste tailings facility when it became apparent that that process inevitably would involve further lengthy and costly permitting delays or lengthy and costly litigation to defend permits, or both.

reserved to EPA the authority to veto any Section 404 permit. 33 U.S.C. § 1344(c). Here, after carefully examining the proposed discharge and commenting on the concerns it initially had, *see, e.g.*, J.A. 371a–74a, EPA declined to veto the permit. This is a robust review process, and SEACC's attempt to portray Section 404 permits as an escape valve for polluters is implausible.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to vacate immediately the injunction pending appeal and to affirm the judgment of the district court.

Respectfully submitted.

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REPLY BRIEF

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Nos. 07-984 & 07-990

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IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE CWA UNAMBIGUOUSLY AUTHORIZES THE CORPS TO PERMIT THIS DISCHARGE	3
A. Effluent Limitations Are Not Applicable To The Permitting Of Fill Discharges	3
B. The Legislative History Confirms The Agencies' Interpretation	9
II. THE AGENCIES REASONABLY RESOLVED ANY AMBIGUITY.	11
III. THE AGENCIES' INTERPRETATION OF THEIR OWN REGULATIONS IS NOT CLEARLY ERRONEOUS.	15
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES:

Auer v. *Robbins*, 519 U.S. 452 (1997) 15

Fujitsu Ltd. v. *NETGEAR, Inc.*, 576 F. Supp. 2d 964 (W.D. Wis. 2008) 17

Gamesa Eolica, S.A. v. *General Electric Co.*, 359 F. Supp. 2d 790 (W.D. Wis. 2005) 17

Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339 (2007) 21

Rapanos v. *United States*, 547 U.S. 715 (2006) 12

Reserve Mining Co. v. *EPA*, 514 F.2d 492 (8th Cir. 1975) 10, 11

Rhodes v. *County of Darlington*, 833 F. Supp. 1163 (D.S.C. 1992) 17

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992) 3

STATUTES:

Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816, as amended:

§ 306(e), 33 U.S.C. § 1316(e) 4

§ 307(d), 33 U.S.C. § 1317(d) 5

§ 309, 33 U.S.C. § 1319 9

§ 401(a)(1), 33 U.S.C. § 1341(a)(1) 14

§ 402, 33 U.S.C. § 1342 7

§ 404(c), 33 U.S.C. § 1344(c) 14

§ 404(n), 33 U.S.C. § 1344(n) 9, 14

REGULATIONS:

33 C.F.R. § 320.4(a)(1) 14
33 C.F.R. § 323.2(f) 16
40 C.F.R. § 122.3(b) 8, 16, 17
40 C.F.R. Part 230 16

ADMINISTRATIVE MATERIALS:

45 Fed. Reg. 85,336 (1980) 18
47 Fed. Reg. 54,598 (1982) 5
51 Fed. Reg. 8,871 (1986) 17
67 Fed. Reg. 31,129 (2002) ..... *passim*

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REPLY BRIEF FOR PETITIONER STATE OF ALASKA

INTRODUCTION

The validity of the petitioners' and the federal agencies' position is demonstrated by statements in respondents' own brief. The plaintiff-respondents

("SEACC") concede that the proposed discharge at the Kensington mine meets the applicable definition of fill material, and that Section 404 authorizes the Corps to permit discharges of fill material subject only to the guidelines specific to that section. *See* SEACC Br. 20, 7. That should be the end of the analysis, since SEACC also concedes that "Congress did not authorize the Corps to issue section 404 permits incorporating effluent limitations under sections 306 or 301"—in other words, that effluent limitations are not applicable to Section 404 permitting decisions. *Id.* at 37. Because there is no dispute that the proposed discharge constitutes fill material under the plain language of the governing regulations, and that the Corps has fully complied with every provision of Section 404, the permit is valid and should be upheld.

But even if there were statutory ambiguity, SEACC neither challenges the reasonableness of the agencies' asserted position nor overcomes the near-absolute deference they are owed in interpreting their own regulations. The agencies reasonably concluded that all fill material should be treated alike, subject to the stringent environmental controls of Section 404. SEACC, by contrast, would require Coeur to destroy a far greater area of U.S. waters in order to erect a massive stack of tailings along the Alaskan coastline. The expert agencies charged with evaluating the issue—the Corps and the State—have determined after extensive analysis that that alternative would be more damaging than the approved plan. There is no basis for this Court to countermand that reasoned determination.

I. THE CWA UNAMBIGUOUSLY AUTHORIZES THE CORPS TO PERMIT THIS DISCHARGE.

A. Effluent Limitations Are Not Applicable To The Permitting Of Fill Discharges.

The central issue in this case is which CWA permitting scheme governs the proposed discharge: Section 404 or Section 402. The parties agree that only one of the two schemes can be applicable. *See* SEACC Br. 7 (if a "discharge is authorized by a valid fill-material permit under section 404, a section 402 permit is not required"). SEACC concedes that the discharge at issue meets the regulatory definition of fill material. *See id.* at 20 (discharge "meets the agencies' new definition of 'fill material'").[1] SEACC further recognizes that Section 404 authorizes the Corps to issue permits for the discharge of fill material subject "to guidelines developed in conjunction with EPA"—*i.e.*, the Section 404(b)(1) Guidelines. *Id.* at 7. And SEACC does not dispute that the discharge at issue meets those Guidelines, which are the only standards imposed by the CWA for issuance of a Section 404 permit. From this, the validity of the Corps' permit should follow ineluctably. The discharge is concededly "fill material"; it complies fully with the Guidelines and all other criteria of Section 404; and EPA did not veto the Corps' permit.

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[1] Some of SEACC's amici question the legal validity of that definition. *See* Mehan Amicus Br. 17-18; Members of Congress Br. 17-18. But SEACC did not raise that argument in the Ninth Circuit or in this Court, and the argument is thus not properly before the Court. *See, e.g., Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

SEACC, however, argues that another CWA provision—Section 306(e)—creates an exception to the Corps' authority to issue Section 404 permits for fill material.[2] SEACC places virtually all its eggs in this basket, but the basket cannot bear the weight. Section 306(e) states that a discharge cannot be "in violation of" an "applicable" performance standard. 33 U.S.C. § 1316(e); *see* Alaska Br. 33-34. Looking to its governing statutory mandate—Section 404—the Corps correctly determined that the performance standard now invoked by SEACC is not applicable to the agency's permitting of this proposed discharge of fill material. Far from undermining that determination, SEACC now expressly concedes that "Congress did not authorize the Corps to issue section 404 permits incorporating effluent limitations under sections 306 or 301." SEACC Br. 37. In other words, under SEACC's *own* interpretation, Section 306 performance standards are *not* applicable to discharges of fill material permitted by the Corps under Section 404. Fill permits are governed instead by the separate Section 404(b)(1) Guidelines. *Id.* at 7. Because this discharge is fill material not governed by effluent limitations, it will not be "in violation" of any "applicable" performance standard.

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[2] SEACC does not even attempt to defend a key ground for the Ninth Circuit's decision and instead mischaracterizes it to avoid admitting to that concession. SEACC Br. 38. Whereas the Ninth Circuit made Section 301(a) and its use of the word "and" a centerpiece of its interpretation, *see* JA527-28a, 531a, SEACC now concedes that "[n]one of this [analysis] resolves the question in this case" because Section 301(a) merely provides that discharges are subject to "applicable" provisions of the CWA and "does not * * * answer whether a particular [CWA] section applies to a particular source or discharge." SEACC Br. 39. Section 301(a) therefore does not preclude The Corps' permit.

It is not surprising that SEACC concedes that performance standards are not applicable to Section 404 permitting, since the plain language of the CWA mandates that interpretation. *See* Alaska Br. 24-30. As SEACC recognizes, whereas Section 402 expressly requires that EPA permits must comply with effluent limitations, "section 404 makes no provision for the Corps to incorporate applicable section 306 performance standards in its permits." SEACC Br. 21. Thus, the very effluent limitation relied on by SEACC was made applicable only to the Section 402 permitting scheme. *See* 47 Fed. Reg. 54,598, 54,606 (1982) (effl ıent limitations promulgated in that regulation "will be applied to individual ore mines and mills through NPDES permits issued by EPA or approved state agencies, under Section 402"). Because Section 404 discharges must comply only with the mandates of that section, Coeur's fill material permit was not required to incorporate EPA performance standards.

Moreover, Congress has shown that it knows how to apply effluent limitations to both fill material and to other discharges otherwise exempt from Section 402, but it never directed the Corps to apply the performance standard invoked by SEACC here. Congress directed the Corps to apply Section 307 effluent limitations for toxic substances—but not other effluent limitations—under Section 404. *See* Alaska Br. 29. Under SEACC's interpretation, this was an unnecessary and redundant act, since Section 307(d) contains the same sort of prohibitory language as Section 306(e). *See* 33 U.S.C. § 1317(d).

Congress also amended the aquaculture permitting authority of Section 318—which, like Section 404, is expressly excepted from Section 402—to require

application of effluent limitations, but made no similar amendment to Section 404. *See* Alaska Br. 28. SEACC's response that the disparate amendment of Section 318 "reinforces" its position, SEACC Br. 38 n.11, has no basis. Before the amendment, discharges associated with approved aquaculture projects—like discharges of fill material today—did not need to comply with effluent limitations. Discharges of fill material remain subject only to the criteria of Section 404.

In short, the CWA nowhere requires the Corps to reject a Section 404 application for a discharge of fill material based on whether it meets effluent limitations promulgated by EPA under Section 306. As a result, SEACC is reduced to arguing that the mere existence of EPA-promulgated effluent limitations creates an unwritten exception to Section 404 that forbids the Corps from permitting a discharge of what is concededly fill material, and instead gives that responsibility to EPA. *See* SEACC Br. 21 (Because Section 404 does not allow the Corps to incorporate performance standards, "discharges from sources subject to performance standards must be permitted, if at all, under section 402"). Thus, it is SEACC, not the State, that is impermissibly attempting to imply an exception that Congress did not provide. *Cf.* SEACC Br. 29-32.

In any event, Section 402 refutes that argument. Whereas Section 404 does not have any exceptions to its permitting authority, Section 402 does. Under Section 404, the Corps may permit *all* discharges of fill material, provided the Section 404(b)(1) Guidelines are met and EPA does not veto. Nor does the word "may" in Section 404 undercut the Corps' authority. *Cf.* SEACC Br. 27. The Corps is not

required to issue every permit for fill material, but it is plainly given the *authority* to do so whenever the requirements of Section 404 are met.[3] By contrast, EPA has no authority under Section 402 when fill material is involved, because that authority applies only "[e]xcept as provided in * * * [Section 404]." 33 U.S.C. § 1342.[4]

Given the parties' agreement that the Corps is prohibited from incorporating EPA performance standards into its Section 404 permitting decisions, it is hard to understand how the Corps could even determine that a proposed discharge of fill is subject to SEACC's unwritten exception, since that determination would depend on EPA's interpretation of its performance standards. The agencies, by contrast, hewed to Congress' comparatively bright line: if a discharge involves dredged or fill material, it is permitted by the Corps under Section 404, applying the criteria set forth in that section; if not, it is permitted by EPA under Section 402.

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[3] Similarly, it is immaterial that Corps regulations refer to other statutes that may apply. *Id.* Those statutes may require additional permits in some instances, but nothing in the CWA—the only statute at issue here—divests the Corps of its authority to permit this discharge under the CWA.

[4] SEACC concedes that this language exempts discharges subject to Section 404 from the Section 402 permitting scheme, but nonetheless argues that Congress would have included a similar exception in Section 306(e) if it had intended to allow the Corps to grant the permit at issue. SEACC Br. 33. Given SEACC's agreement that Section 306 effluent limitations are part of the Section 402 scheme but not the Section 404 scheme, that claim unravels. There was simply no need for Congress to write an exception into every provision relating to the Section 402 permitting scheme when it already did so in Section 402 itself.

Regardless, even under SEACC's own theory, it is EPA's regulations, and not the CWA itself, that determines when Section 306(e) prohibits a discharge. The statute would not answer the question because the permissibility of a discharge would turn on the nature of EPA's performance standards. In other words, under SEACC's theory EPA determines when a discharge is in "violation" of an "applicable" performance standard. But here, EPA has determined, both as a general matter and as applied to this mine, that the performance standard invoked by SEACC is *not* applicable to this proposed discharge, and that the proposed discharge will not violate it.[5] As shown below, SEACC cannot overcome the broad deference owed EPA in the interpretation of its own regulations. Therefore, even if the statute itself did not render the performance standard inapplicable to this case, EPA's own regulations and decisions have. *See* Alaska Br. 34.

Finally, there is no merit to SEACC's assertion that Section 306(e) has an "independent" effect that voids the Corps' permit in this case. *See* SEACC Br. 33-36. Section 306(e) might conceivably be invoked in an enforcement action where a discharge subject to an applicable performance standard has received *no* permit at all. But this case challenges a permit for the discharge of fill material issued by the Corps under Section 404, and the parties agree that the Corps has no authority to incorporate Section 306 performance standards into that permitting decision.

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[5] *See* 40 C.F.R. § 122.3(b) (exempting discharges of fill from NPDES permitting requirements); JA144a-145a (EPA determination that "effluent limitations guidelines and standards, such as those applicable to gold ore mining * * * do not apply to the placement of the tailings into the proposed impoundment").

Thus, there is no basis to void the Corps' action pursuant to the purported "independent" effect of a provision that the Corps is concededly not authorized to apply. SEACC's reliance on Section 404(n), 33 U.S.C. § 1344(n), is similarly misplaced. *See* SEACC Br. 27-28. That section merely preserves EPA's ability to institute enforcement actions under Section 309, 33 U.S.C. § 1319, where such actions would be appropriate; it says nothing about whether effluent limitations apply to fill material.[6]

The CWA is unambiguous that the Corps may issue a permit for the discharge of fill material that complies with the Section 404(b)(1) Guidelines and is not vetoed by EPA. Since the discharge at issue concededly meets all these criteria, the permit was proper and the Ninth Circuit's decision should be reversed.

B. The Legislative History Confirms The Agencies' Interpretation.

Alaska explained in its opening brief that SEACC's position vitiates Congress' key compromise in enacting Section 404. *See* Alaska Br. 38-40. Under that conference committee compromise, the Corps retains the authority to permit all discharges of dredged and fill material, subject to EPA environ-

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6 Moreover, under Section 404(p), compliance with a Section 404 permit is "deemed" compliance with all of Section 301 for purposes of enforcement, and Section 301(a) in turn incorporates a requirement to comply with Section 306 to the extent applicable. That is yet another reason why the Corps' permit is valid. *See* Alaska Br. 34. Although SEACC notes that Section 404(p) does not refer to Section 306, that is not surprising given that all parties agree that Section 404 permits need not comply with Section 306 performance standards. *See* Fed. Resp. Br. 22 n.5.

mental oversight in the form of the Section 404(b)(1) Guidelines and EPA's veto right. Congress explicitly rejected a version of the statute initially proposed by the House—and urged by SEACC here—under which discharges of dredged and fill material would be subject to EPA effluent limitations. SEACC does not respond to—and thus effectively concedes—this understanding of the actual legislative history.

Instead, SEACC attempts to draw contrary inferences from the minutiae of a pre-CWA dispute involving a single mining company. *See* SEACC Br. 42-43 (discussing *Reserve Mining Co.* v. *EPA*, 514 F.2d 492 (8th Cir. 1975)). That case, however, did not implicate the CWA. *See Reserve Mining*, 514 F.2d at 526 n.65 (CWA is "not applicable to this litigation"). SEACC notes that, prior to the CWA, that company had elected to apply for tailings discharge permits under both the Rivers and Harbors Act ("RHA") and the Refuse Act, and that the CWA transferred the latter application to the EPA. *See* SEACC Br. 42-43; *cf.* Alaska Br. 37 (discussing pre-CWA statutory scheme). But the Refuse Act application was not even acted upon. *See Reserve Mining*, 514 F.2d at 531. And there is no indication anywhere in the legislative history that this single company's permit application decisions were to inform the content of the CWA.

Rather, as Alaska has noted, the *Reserve Mining* case shows the shortcomings in the Corps' previous permitting authority, which focused on navigational rather than environmental concerns. *See id.*; Alaska Br. 37-38. Thus, for example, there is no indication that the RHA permit issued to the Reserve Mining company involved secure impoundments, mitigation measures, or any EPA environmental review—all of

which are mandated by the Section 404 permit at issue here. *See Reserve Mining*, 514 F.2d at 500. Nor is there any indication that the discharges would have qualified as "fill material" under the new CWA—pursuant to any definition of that term—since they were unlikely to have raised the elevation of Lake Superior. Congress' solution to the shortcomings in the Corps' authority was to retain the Corps' pre-existing ability to permit discharges of tailings that qualify as fill material, but to require EPA environmental oversight *within* the Section 404 process, through application of the Section 404(b)(1) Guidelines, effluent limitations for toxic substances, and EPA's absolute veto right. The permit at issue faithfully carries out that mandate.

II. THE AGENCIES REASONABLY RESOLVED ANY AMBIGUITY.

Alaska has shown that even if the statute were ambiguous, the federal agencies' resolution of any ambiguity would be entitled to dispositive deference under *Chevron*. *See* Alaska Br. 41-49. This issue is now easy to resolve, since SEACC nowhere challenges the reasonableness of the agencies' determination that EPA effluent limitations do not apply to discharges of fill material permitted by the Corps (in the event the statute itself does not dictate the answer). Instead, SEACC contends (wrongly, as shown below) that the agencies cannot even construe their own regulations as endorsing that proposition. Thus, in the event that the Court defers, as it should, to the agencies' interpretation of their own regulations, there is no dispute that that interpretation passes muster under the second step of the *Chevron* analysis.

Rather than contest this issue directly, SEACC and its amici attempt to impugn the agencies' judgment indirectly, by positing a parade of environmental horribles that will allegedly befall this project and others in the future if all fill material remains subject to the Corps' authority. There is no basis for these dire predictions. As the agencies determined, there are sound reasons for subjecting all fill material to a distinct regulatory scheme tailored to the environmental issues posed by such discharges. *See* Alaska Br. 44-49; *Rapanos* v. *United States*, 547 U.S. 715, 744-45 (2006) (plurality).[7] Moreover, the Corps and the State—which have responsibility for ensuring the environmental soundness of this project—painstakingly examined this proposed project and reasonably determined that the lake fill option is more environmentally protective than permanently destroying a far larger area of wetlands in order to construct a large open-air tailings pile.

SEACC misleadingly asserts that the tailings fill would be toxic to aquatic life due to its elevated pH level. SEACC Br. 4. As SEACC's own record citations make clear, any elevated levels "are expected to occur only in the immediate vicinity of the tailings pipe outfall" and "will dissipate very rapidly." JA206a, 360a. *See* Alaska Br. 14. Moreover, as SEACC admits, there will be only "trace" concentrations of metals in the tailings, SEACC Br. 4, and their toxicity will be no different

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[7] SEACC does not even cite *Rapanos*, much less distinguish its statements regarding the differences between the regulation of discharges of fill material and discharges of mobile waterborne pollutants.

than that of the lake's natural sediment, JA156a.[8] Thus, the expected loss of aquatic life—which is to be fully restored—would primarily occur from organisms being covered with the discharged material rather than from toxicity. JA483a. But this is no reason to treat this discharge any differently from other discharges of fill material. *All* fill material, by definition, will cover whatever organisms may be on or near the bottom.

Notably absent from SEACC's brief is any defense of the alternative that would likely occur if Coeur's permit is invalidated: the permanent destruction of an area of wetlands five times the size of Lower Slate Lake in order to facilitate an unsightly tailings stack above Lynn Canal. As the Corps and the State reasonably concluded—and SEACC does not dispute here—this option would be more environmentally harmful than the approved plan.

This fact also points out the logical fallacies in SEACC's interpretation. Its reasoning would absolutely prohibit the proposed tailings discharge, but would still allow the Corps to permit Coeur to fill the lake, or another waterbody, with material of the same composition as the tailings, as long as it does not come from a mine or some other source covered by an effluent limitation. And Coeur could then dump its tailings on top of what would then be dry land, free from any further CWA oversight under either permit program. Rather than adopt this bizarre regime, the agencies reasonably concluded that all fill material should be subjected to the same rigorous permitting requirements under Section 404.

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8 Although SEACC misleadingly implies otherwise (SEACC Br. 3), no cyanide will be used in this mine, SER853.

Given those requirements, there is no basis for SEACC's implication that the Corps would now begin to permit fill discharges of such things as manure, battery manufacturing waste, or asbestos. SEACC Br. 45, 51. There is no indication that the Corps ever has done or ever would do so. Section 404 permitting is a rigorous process. The Corps examines myriad factors including toxicity and water quality; it forbids any discharge if there is a practicable and less harmful alternative; and it requires extensive mitigation efforts. *See* NAHB Amicus Br. 17-27. The Corps also conducts an expansive public interest inquiry, evaluating a vast array of concerns including aesthetics, wildlife values, recreation, water supply and conservation, and "in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a)(1). States such as Alaska may also impose their own restrictions. *See* 33 U.S.C. § 1341(a)(1). And even if a discharge satisfies the Corps' rigorous process based on EPA's own Section 404(b)(1) Guidelines, EPA may still veto any permit based on its own determination that the discharge will have an "unacceptable adverse effect" on water supplies, fisheries, or recreational areas. 33 U.S.C. § 1344(c).

The solid material that Coeur proposes to discharge is ground up earth and rock, not toxic sludge. The governing regulations expressly allow this discharge to be permitted as fill material because while tailings may be in a "slightly different physical form from the traditional rock and soil used as fill material," they nonetheless "can have the same effect on the aquatic environment as those materials." JA93a. To the extent there is any ambiguity in the statute, there is no dispute that the agencies reasonably resolved it by treating all fill material under the same statutory and regulatory framework.

III. THE AGENCIES' INTERPRETATION OF THEIR OWN REGULATIONS IS NOT CLEARLY ERRONEOUS.

Although it does not dispute that the position espoused by the agencies in their regulations is entitled to *Chevron* deference, SEACC Br. 43, SEACC nevertheless disputes the agencies' view as to what their regulations actually say. But SEACC ignores the daunting legal standard that stands in the way of that argument. Although it concedes that "[a]n authoritative expression of an agency's interpretation of its rule is entitled to deference as to the rule's meaning," SEACC Br. 58, SEACC fails to apply that standard to the central issue in this case.

SEACC cites a hodgepodge of agency statements and actions over a 30-year period as if it were this Court's role to determine in the first instance what the Corps and EPA intended in their own regulations. It is not. The agencies have definitively stated, in formal pronouncements rendered after notice-and-comment, that "EPA has *never* sought to regulate fill material under effluent guidelines" and that "*any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" 67 Fed. Reg. 31,129, 31,135 (2002) (emphases added). The agencies have likewise espoused that view in their brief to this Court, which independently warrants deference. *See Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of

deference.").[9] Thus, in determining the meaning of the agencies' regulations, this Court's task is an easy one: this interpretation by the agencies of their own regulations is "controlling" unless "plainly erroneous or inconsistent with the regulation[s]." *Id.* at 461. As discussed below, SEACC does not even come close to overcoming that controlling deference.

1. SEACC fails to show how the agencies' interpretation of their own regulations conflicts with the plain language of the regulations themselves. To the contrary, the regulations provide that discharges of fill material include the "placement of * * * tailings," 33 C.F.R. § 323.2(f); that a Section 404 permit may be granted for such discharges without compliance with the effluent limitation relied on by SEACC, *see* 40 C.F.R. Part 230; and that no EPA permit is required for "discharges of dredged or fill material into waters of the United States which are regulated under section 404 of [the] CWA." 40 C.F.R. § 122.3(b). And SEACC expressly concedes that the discharge at issue "meets the agencies' new definition of fill material." SEACC Br. 20. SEACC's inferences based on snippets from preambles and unpublished responses to comments—while mistaken—are ultimately immaterial, since those statements cannot override or displace the regulations themselves. *See* Alaska Br. 50-51; Fed. Br. 34.

Also unavailing is SEACC's attempt to play grammarian with the lack of a comma before the word "which" in EPA's longstanding regulation exempting discharges of fill material from NPDES

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[9] Although EPA is not a formal party to this case, its counsel has joined the Federal respondents' brief, and Alaska understands that that brief represents the considered views of both the Corps and EPA.

permitting. *See* SEACC Br. 48. There is an "inherent ambiguity" in this usage because "the lack of a comma suggests that the modifying clause is restrictive" whereas "the word 'which' suggests that the clause is nonrestrictive." *Rhodes* v. *County of Darlington*, 833 F. Supp. 1163, 1190 n.18 (D.S.C. 1992).[10] Thus, the regulation is, at a bare minimum, ambiguous, meaning that EPA—not SEACC—is the final arbiter of its meaning. And EPA stated unequivocally in 2002, long after the comma went missing, that the agency had "never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135. The agency had similarly concluded in 1986 that "discharges listed in the Corps' definition of 'discharge of fill material' * * * remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8,871 (1986).[11]

Because these interpretations are consistent with the regulation and not clearly erroneous, they control here. Indeed, even SEACC admits that the original 1973 version of what is now 40 C.F.R. § 122.3(b) unambiguously provided that all discharges of fill

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[10] *See also Fujitsu Ltd.* v. *NETGEAR, Inc.*, 576 F. Supp. 2d 964, 2008 U.S. Dist. LEXIS 28700, *12 (W.D. Wis. 2008) (although absence of preceding comma generally denotes non-restrictive phrase, drafters of patent at issue "did not intend the word 'which' to be non-restrictive"); *Gamesa Eolica, S.A.* v. *General Elec. Co.*, 359 F. Supp. 2d 790, 802 (W.D. Wis. 2005) (same).

[11] In a footnote, SEACC states that the definition of fill material was different when the 1986 statement was made. SEACC Br. 52 n.15. But SEACC does not explain how that fact is relevant. Although the agencies' definition of fill material evolved over the years, they consistently reaffirmed that *all* fill material falls under the Section 404 permit program.

material were exempt from EPA permitting. *See* SEACC Br. 48. This fact renders implausible SEACC's assertion that the agency abruptly shifted course many years later, without any explanation, through grammatical sleight-of-hand.

SEACC simply ignores that the Section 404(b)(1) Guidelines, jointly promulgated by EPA and the Corps, have always provided that discharges of fill material may be permitted without compliance with Section 306 performance standards. The Guidelines "provide a comprehensive means of evaluating whether any discharge of fill material * * * is environmentally acceptable and therefore may be discharged in accordance with the CWA." 67 Fed. Reg. at 31,133. Yet they have *never* required application of Section 306 standards. Although the Guidelines were amended in 1980 (consistent with the statute) to require compliance with toxic effluent limitations promulgated under Section 307, the agencies did not even discuss including Section 306 effluent limitations under that mandate. *See* 45 Fed. Reg. 85,336 *et. seq.* (1980).

Thus, the federal agencies' interpretation that discharges of fill material are not governed by Section 306 standards of performance is fully consistent with the plain language of both the NPDES and Section 404 regulations. That should be the end of the analysis, since SEACC does not dispute that that interpretation passes muster under *Chevron* in the event the statute itself does not answer the question.

2. But even if one looks at the extra-regulatory snippets cobbled together by SEACC, the answer is no different. In none of those statements did either EPA or the Corps state that discharges meeting the

operative definition of fill material would be subject to EPA permitting or Section 306 performance standards. Rather, as explained in the opening briefs and above, they consistently stated the opposite.

The weakness in SEACC's argument is revealed by its critical reliance on the agencies' *deletion* of language from the 2002 fill rule that would have excluded discharges subject to effluent limitations. SEACC Br. 56. An agency's interpretation of its own regulation cannot be overturned by adopting language that was intentionally deleted from the regulation itself. And SEACC ignores the actual reason that language was removed. The agencies excluded the provision partly in response to a comment from the mining industry that the proposed language "could inadvertently result in attempts by regulators in the field to have discharges excluded from section 404 coverage simply due to the presence of constituents in the material for which effluent limitation guidelines exist," including "mine drainage or process waste water." JA45a-46a.

Nor did the agencies state that "mine tailing discharges subject to effluent limitations would remain so." SEACC Br. 56 (citing JA47a-48a). The cited commentary states that "*any* material that has the effect of fill is regulated under section 404" and that the placement of "tailings" is "considered a discharge of fill material." JA48a (emphasis added). The agencies understood that the new fill rule, which eliminated the "waste" exclusion and treats all fill discharges consistently, might slightly increase the number of discharges subject to Section 404. *See* JA43a (stating that rule would not "greatly increase" waste disposal activities regulated by section 404). And although the agencies intended to preserve the

validity of any previous EPA "determin[ation] that certain materials are subject to an [effluent limitation guideline] under specific circumstances," JA48a, no such determination was ever made in the specific circumstances of the Kensington project. In fact, the agencies expressly made the opposite determination. *See* JA141a-149a.

SEACC's reliance on unrelated statements involving the regulation of asbestos is equally wide of the mark. *See* SEACC Br. 50-51. SEACC posits that EPA must have intended to subject discharges of fill material to effluent limitations because it allegedly declined to issue Section 307 guidelines for asbestos contained in mining discharges. This convoluted theory collapses, given that the cited statements nowhere refer to Section 404 or fill material, or even Section 307. Nothing in this unrelated rulemaking even remotely implies that fill material is subject to Section 306 standards of performance, or that asbestos in fill material would be otherwise unregulated. In fact, the flexible process under Section 404 is fully capable of protecting against asbestos contamination, should it ever arise. *See* 67 Fed. Reg. at 31,133 (process "is expressly designed to address the entire range of environmental concerns arising from discharges of dredged or fill material").

Faced with an absence of any agency statements supporting its own position, SEACC resorts to unsupported characterizations. It asserts that "[f]or decades, EPA issued NPDES permits for discharges that met its effect-based definition of 'fill material' but were also subject to effluent limitations." SEACC Br. 49 (citing JA83a-84a). As support, SEACC cites agency commentary on the 2002 fill rule, but one will search the cited pages in vain for

any such statement. That is not surprising, given EPA's contemporaneous statement in the actual regulations that "EPA has never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135.

SEACC also asserts that the so-called Regas Memorandum—which entirely rejects SEACC's position—recognizes that discharges with an "incidental" filling effect "would meet the new definition of 'fill material' but would not be eligible for section 404 permits." SEACC Br. 50. But that is false. The agencies made clear that discharges with such incidental effects would *not* meet the fill definition. *See* 67 Fed. Reg. at 31,135 ("[W]e do not consider such pollutants to be 'fill material.'"); JA46a (same); Alaska Br. 53. The Regas memorandum simply reflects that determination. *See* JA145a.[12]

SEACC also disputes whether the Corps previously had a practice of permitting discharges of fill material that also implicated effluent limitations. The Corps' practice is of little import in interpreting its

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12 That memorandum, issued in 2004 by the heads of all the relevant EPA water regulation offices, embraces the interpretation advanced by petitioners and the Federal respondents in this case. *See* JA141a-149a. SEACC, however, contends that this pronouncement is not entitled to deference under either *Chevron* or *Auer* because it allegedly changed agency policy. SEACC Br. 59-60. As explained above and in Alaska's opening brief, the memorandum merely restated longstanding agency policy reflected in regulations and statements made after notice-and-comment, which unquestionably deserve deference. In any event, the memorandum is itself entitled to deference under this Court's standards. *See* Alaska Br. 42 (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002)) (*Chevron* deference); *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (*Auer* deference).

regulations, since the actual regulations have never required application of EPA effluent limitations. But regardless, in 1984 the Corps issued a Section 404 permit for the Red Dog Mine—which would have been subject to the performance standard for process wastewater relied on by SEACC here—to discharge its tailings into waters of the United States. *See* SER 979; Coeur Br. 40-41. SEACC notes that that permit was to aid construction of a dam for the impoundment, *see* SEACC Br. 53, but that is a distinction without a difference. Under SEACC's theory, no fill permit can ever issue for any discharge of mine tailings from a froth flotation mill into any regulated waters for any purpose. Yet both in this case and 24 years ago at the Red Dog Mine, the Corps permitted a discharge of mine tailings as fill material when those tailings originated at a mine subject to that effluent limitation.

As explained in the opening briefs, while the agencies' definition of "fill material" has evolved over the years, they have been entirely consistent on the central point at issue in this case. If a discharge meets the operative definition of fill material, it has always been permitted by the Corps under Section 404, and has never been subject to permitting by EPA under Section 402 or to the Section 306 effluent limitations applied thereunder. The 2002 fill rule confirmed that interpretation. The agencies decided on a uniform definition of fill material, and determined that "by establishing a program under section 404 for authorizing discharges of fill material into waters of the U.S., Congress sanctioned the filling or elimination of waters where it can be done in an environmentally acceptable manner, i.e., where consistent with the 404(b)(1) Guidelines." JA51a. Under that interpretation, the definition of "fill

material" is a bright-line test that "determines the basic jurisdiction of the section 404 versus the section 402 program." 67 Fed. Reg. at 31,133.

* * *

This case is straightforward. There is no dispute that the proposed discharges are fill material under the applicable definition. The CWA is clear that the Corps may permit this discharge, because it meets the Section 404(b)(1) Guidelines and was not vetoed by EPA. But even if the statute were ambiguous, the expert agencies' interpretation of the statute—which in turn consists of valid interpretations of their own regulations—is reasonable and therefore entitled to dispositive deference under *Chevron*.

CONCLUSION

For the foregoing reasons, and those in Alaska's opening brief, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 07-984 and 07-990

In The Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF AMERICAN RIVERS, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, EARTHWORKS, AND WATERKEEPER ALLIANCE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. CONGRESS INTENDED SECTION 402, NOT SECTION 404, TO CONTROL THE DISCHARGE OF INDUSTRIAL POLLUTANTS IN PROCESS WASTEWATER 7

A. Section 402 Establishes a Comprehensive, Technology-Based Program to Regulate Industrial Discharges and Reduce or Eliminate Pollutant Loading Over Time 7

B. Section 404 Functions Differently from Section 402 by Employing a "Practicability" Standard and Applying a Hierarchy of Avoidance, Minimization, and Mitigation Rather than Strict Pollution Control Technologies 12

C. The Corps' Approach in This Case Marks a Radical Departure From Congressional Intent and Past Agency Practice 18

1. Congress, the Corps, and the Courts Have All Recognized the Distinction Between Mining Process Wastes and Fill 18

TABLE OF CONTENTS – Continued

Page

2. EPA Has Long Recognized that Discharges from the Industrial Processing of Mining Wastes Are Subject to Section 306 and Section 402 of the Clean Water Act 21

II. PETITIONERS' NEW INTERPRETATION OF SECTION 404 VIOLATES THE CLEAR LANGUAGE OF THE CLEAN WATER ACT AND UNDERMINES THE ACT'S BASIC REGULATORY FRAMEWORK 24

A. Applying Section 404 to Industrial Waste Discharges Directly Conflicts With Sections 306 and 402 and Would Allow Many Mining and Other Industrial Wastes to Avoid Effluent Limitations..... 24

B. Applying the Section 404 Permitting Scheme to Industrial Waste Discharges Undermines the Role of the States in the Section 402 Permitting Program and Reallocates Power to the Federal Government, Contrary to Congress' Explicit Intent 30

III. KENSINGTON MINE HAS VIABLE ALTERNATIVES TO DISPOSING INDUSTRIAL WASTE IN NATURAL LAKES..... 32

A. Dry Stacking..... 32

B. Paste Disposal 33

TABLE OF CONTENTS – Continued

Page

C. Man-Made Holding Facilities for Mine Tailings 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984) 10

E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1985) 22

EPA v. Cal. ex rel. State Water Res. Control Bd., 426 U.S. 200 (1976) 9

Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 19, 20

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Rapanos v. United States, 547 U.S. 715 (2006) 30

Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) 19

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Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) 8

STATUTES

Clean Water Act, 33 U.S.C. § 1251 *et seq.* 1

33 U.S.C. § 403 13

33 U.S.C. § 407 19

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1251(a) 8
33 U.S.C. § 1251(a)(1) 8
33 U.S.C. § 1251(a)(2) 6
33 U.S.C. § 1251(b) 31
33 U.S.C. § 1311(a) 3
33 U.S.C. § 1311(b)(2)(A) 9
33 U.S.C. § 1311(b)(2)(E) 9
33 U.S.C. § 1311(d) 10
33 U.S.C. § 1313(c) 9
33 U.S.C. § 1314(b) 9, 10
33 U.S.C. § 1316(a)(1) 22
33 U.S.C. § 1316(e) 6
33 U.S.C. § 1318(a) 11
33 U.S.C. § 1318(b) 12
33 U.S.C. § 1342 ..... 2, 25
33 U.S.C. § 1342(a)(2) 11
33 U.S.C. § 1342(b)(1)(B) 11
33 U.S.C. § 1342(o)(1) 11
33 U.S.C. § 1344 2
33 U.S.C. § 1344(c) 14
33 U.S.C. § 1344(g) 15
33 U.S.C. § 1365(a)(1)(A) 12

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1365(f)(6) 12

33 U.S.C. § 1412(b) 10

REGULATIONS

40 C.F.R. Part 123 10

40 C.F.R. Part 136 28

40 C.F.R. Part 405 26

40 C.F.R. Part 406 26

40 C.F.R. Part 411 26

40 C.F.R. Part 425 26

40 C.F.R. Part 429 26

40 C.F.R. Part 432 26

40 C.F.R. Part 434 ..... 25, 29

40 C.F.R. Part 436 26

40 C.F.R. Part 440 25

40 C.F.R. § 122.41(j) 11

40 C.F.R. § 122.42(a) 11

40 C.F.R. § 131.4 10

40 C.F.R. § 131.10 9

40 C.F.R. § 230.10 16

40 C.F.R. § 230.10(d) 16

40 C.F.R. § 230.70 15

40 C.F.R. § 230.71 15

TABLE OF AUTHORITIES – Continued

Page

40 C.F.R. § 401.16 28
40 C.F.R. § 406.16 28
40 C.F.R. § 421.22 29
40 C.F.R. § 421.24 ..... 29, 30
40 C.F.R. § 421.34 ..... 29, 30
40 C.F.R. § 421.52 29
40 C.F.R. § 421.54 29
40 C.F.R. § 421.72 29
40 C.F.R. § 421.74 ..... 29, 30
40 C.F.R. § 421.84 29
40 C.F.R. § 421.92 29
40 C.F.R. § 421.94 29
40 C.F.R. § 421.102 29
40 C.F.R. § 421.104 29
40 C.F.R. § 421.112 29
40 C.F.R. § 421.114 29
40 C.F.R. § 421.122 29
40 C.F.R. § 421.124 29
40 C.F.R. § 421.132 29
40 C.F.R. § 421.134 29
40 C.F.R. § 421.142 29
40 C.F.R. § 421.144 29
40 C.F.R. § 421.152 29

TABLE OF AUTHORITIES – Continued

Page

40 C.F.R. § 421.154 29
40 C.F.R. § 421.182 29
40 C.F.R. § 421.184 29
40 C.F.R. § 421.194 29
40 C.F.R. § 421.204 29
40 C.F.R. § 421.212 29
40 C.F.R. § 421.214 29
40 C.F.R. § 421.222 ..... 29, 30
40 C.F.R. § 421.224 ..... 29, 30
40 C.F.R. § 421.232 29
40 C.F.R. § 421.234 29
40 C.F.R. § 421.244 29
40 C.F.R. § 421.252 29
40 C.F.R. § 421.254 29
40 C.F.R. § 421.262 29
40 C.F.R. § 421.264 29
40 C.F.R. § 421.274 29
40 C.F.R. § 421.282 29
40 C.F.R. § 421.284 29
40 C.F.R. § 421.292 29
40 C.F.R. § 421.294 29
40 C.F.R. § 421.302 29
40 C.F.R. § 421.304 29

TABLE OF AUTHORITIES – Continued

Page

40 C.F.R. § 421.312 29
40 C.F.R. § 421.314 29
40 C.F.R. § 421.322 29
40 C.F.R. § 421.324 29
40 C.F.R. § 421.332 29
40 C.F.R. § 421.334 29
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40 C.F.R. § 429.111 29
40 C.F.R. § 440.104(b)(1) 5, 22

SUPREME COURT RULES

S. Ct. Rule 37.3(a) 1
S. Ct. Rule 37.6 1

FEDERAL REGISTER

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51 Fed. Reg. 24,974 (July 9, 1986) 26
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67 Fed. Reg. 31,129 (May 9, 2002) 23

TABLE OF AUTHORITIES – Continued

Page

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Conf. Rep. No. 92-500 13

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TABLE OF AUTHORITIES – Continued

Page

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Mine Gives Up Permits Pursuit, Spokesman-Review.com, Sept. 26, 2008.....33

TABLE OF AUTHORITIES – Continued

Page

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INTERESTS OF *AMICI CURIAE*

Amici American Rivers, National Wildlife Federation, Natural Resources Defense Council, Earthworks, and Waterkeeper Alliance submit this brief in support of Respondents Southeast Alaska Conservation Council, et al., urging the Court to affirm the decision below.[1] *Amici* are non-profit public interest organizations working to protect the environment, public health, and communities that rely on healthy waters, whose work includes persuading policy makers to provide greater environmental and public health protection, conducting research into environmental and public health problems, and using the citizen suit provisions of environmental laws, including the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to enforce those laws. *Amici* all have a long history of involvement in, and expertise concerning, the protection of our nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, they have pursued these interests repeatedly during the three

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[1] In accordance with S. Ct. Rule 37.3(a), all parties have consented to the filing of this brief. All petitioners and respondents except the United States have done so by consent letters filed directly with the Clerk; the consent of the Solicitor General is filed herewith. Pursuant to S. Ct. Rule 37.6, Counsel for *Amici* state that no counsel for a party authored this brief in whole or in part and no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

decades since enactment of the seminal 1972 amendments that gave the Act its current structure. Specifically, *Amici* have participated in the section 402 and section 404 permitting processes under the Clean Water Act and have been involved as parties or friends of the court in various Clean Water Act cases before this Court and others, including through the filing of an *amicus* brief in the lower court in this case. All of these organizations have members and supporters who use and rely on a wide array of waters throughout our nation for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply. *Amici*'s interests in protecting waterways across the United States are threatened if the Court reverses the decision below.

SUMMARY OF ARGUMENT

The Clean Water Act, one of the nation's most vital environmental laws, regulates the discharge of pollutants into waters of the United States. It does so in large part through two permit programs. First and most comprehensive, section 402 requires a National Pollutant Discharge Elimination System ("NPDES") permit for discharges of pollutants by industrial and municipal sources. 33 U.S.C. § 1342. Second, section 404 requires a permit for discharges of "dredged or fill material," which often involves physical alterations to water bodies, such as the filling of wetlands or other waters to facilitate construction. 33 U.S.C. § 1344. In essence, section 404 is

an exception to the ordinary rule of NPDES permitting for a very narrow subset of discharges to water – those that may physically alter the aquatic environment in an adverse way. Unless a discharge is permitted under one of these programs, it is prohibited. 33 U.S.C. § 1311(a).

The differences between the two Clean Water Act permit programs are significant, reflecting their very different purposes. The NPDES program works to protect the nation's waters from the disposal of polluted waste streams. It does so by incorporating industry-specific technology-based effluent limitations designed to reduce and eventually eliminate the discharge of pollution. Importantly, the U.S. Environmental Protection Agency ("EPA") develops effluent limitation guidelines to establish technology-based requirements for all categories and classes of pollutant discharges. States, which typically issue individual NPDES permits under federal law, must translate these guidelines into effluent limitations and must include any other protections necessary to ensure compliance with state water quality standards. The statute expressly requires periodic review and updating of available controls, effluent limitations, and individual permits to ensure that pollution loading continues to decrease as technology improves.

Section 404 dredge and fill material permits, on the other hand, ordinarily target the physical impairment of rivers, wetlands, and other waters and

the destruction of aquatic habitat, rather than end-of-the-pipe discharges. Implemented primarily by the U.S. Army Corps of Engineers ("Corps") with minimal EPA oversight and little state involvement, dredge and fill permits cover what are typically one-time construction activities. For this reason, the section 404 program does not focus on effluent limitations and control technologies, but instead addresses ecological impacts by requiring project proponents to first avoid, then minimize, and then mitigate any project impacts. Because section 404 is not intended to address ongoing pollution discharges, dredge and fill permits also do not include the kind of monitoring, reporting, review, and renewal provisions that lie at the heart of the technology-forcing NPDES program. Thus, while the section 404 permit program plays a vital role in protecting the nation's waters from the harmful effects of discharges that convert water bodies to dry land, it simply is not equipped – and was never intended – to displace the regulation of industrial pollutants under section 402.

The Corps' and Petitioners' position here contravenes this basic statutory architecture by authorizing what is self-evidently an ongoing discharge of industrial pollutants under the section 404 dredge and fill permit program. The proposed new Kensington Mine gold processing facility will discharge an estimated 210,000 gallons of polluted wastewater every day into a sub-alpine lake in the Tongass National Forest. This wastewater stream is the result of a froth-flotation process that uses a variety of conditioners

and frothing agents to separate gold from the rest of the mined material. Joint Appendix ("JA") 192a. Once the gold is extracted, the resulting waste stream is a slurry – a suspension of solids in water – consisting of chemical additives, heavy metals such as aluminum, copper, lead and mercury, and crushed rock debris. With a pH of 10, this waste slurry will kill all fish and most other aquatic life in Lower Slate Lake. *Id.* at 197a, 206a. The toxicity resulting from the discharge may well preclude the lake from ever again providing a suitable habitat for macroinvertebrates, which are critical for supplying nutrients to fish. *Id.* at 199a. Thus, "the extent to which aquatic life could be restored eventually is unclear." *Id.* at 522a. To avoid these kinds of harms, and after evaluating the availability of treatment alternatives, EPA in 1982 established a zero-discharge standard of performance for wastewater from new froth-flotation gold processing operations like Kensington Mine. 40 C.F.R. § 440.104(b)(1). If reversed, this case would allow the facility to circumvent EPA's long-standing no-discharge standard.

The implications of Petitioners' and the Corps' statutory interpretation in this case extend well beyond the gross pollution of the Lower Slate Lake and the complete destruction of its ecosystem. Many industries currently discharge polluted wastewater containing sediments or other settlable solids that might alter the bottom elevation of the receiving water. Indeed, EPA has established technology-based standards for total suspended solids from many

industrial categories. Under Petitioners' reading of the Clean Water Act, these sources could well fall out of the NPDES program altogether by virtue of the solids content in their waste streams, even when those wastes contain significant levels of harmful industrial pollutants. Such a result would violate the plain reading of the Clean Water Act, dramatically undercut the Act's fundamental structure, and mark a radical departure from more than 30 years of agency practice. Moreover, it could significantly alter the states' important historical role in regulating local water quality by controlling industrial discharges. The Court should not embrace an interpretation of the Clean Water Act that both subverts the plain language of the law and threatens to upend the successful federal-state partnership that has moved the nation's waterways ever closer to the statutory goals of "swimmable" and "fishable." *See* 33 U.S.C. § 1251(a)(2).

ARGUMENT

The decision below properly recognized that this dispute is resolved by the plain language of section 306(e), which has independent force and declares that all new sources "shall" comply with any applicable performance standard. 33 U.S.C. § 1316(e). As Respondents explain, because EPA has promulgated a zero-discharge standard of performance for the froth-flotation process at issue here, no discharge can be permitted under the Corps' discretionary section 404

permitting program, even if the resulting wastewater has sufficient solids to alter the bottom elevation of a water of the United States. Claims to the contrary in this lawsuit are an improper attempt to rewrite this standard of performance without following the proper rulemaking process. A judicial interpretation of the Clean Water Act that allows a section 404 permit to override duly promulgated standards of performance and effluent limitations undermines the fundamental structure and intent of the statute.

I. CONGRESS INTENDED SECTION 402, NOT SECTION 404, TO CONTROL THE DISCHARGE OF INDUSTRIAL POLLUTANTS IN PROCESS WASTEWATER.

A. Section 402 Establishes a Comprehensive, Technology-Based Program to Regulate Industrial Discharges and Reduce or Eliminate Pollutant Loading Over Time.

The plain language, statutory structure, historical background, and legislative history of the Clean Water Act all demonstrate that Congress intended to regulate industrial process wastewater of the kind at issue here through the comprehensive NPDES program, not through section 404 dredge and fill permits. Under the umbrella of section 402, Congress created an all-encompassing wastewater discharge permit program to protect public health and preserve water quality for industrial, domestic, recreational, and wildlife uses. The section 402

program is undergirded by the discharge prohibitions, effluent limitations, and water quality standards embodied in sections 301, 303, 304, and 306 of the statute. Together with the statute's information gathering, monitoring, and reporting requirements, these substantive provisions are designed to implement the "national goal that the discharge of pollutants into navigable waters be eliminated," 33 U.S.C. § 1251(a)(1).

The Clean Water Act, enacted in the wake of an alarming rise in industrial pollution, establishes an overarching objective "to restore and maintain the chemical, physical and biological integrity of the nation's waters," 33 U.S.C. § 1251(a). For the two decades immediately following World War II, congressional efforts to address the expanding water pollution problem from a receiving water quality perspective proved largely unsuccessful. *See Weyerhauser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978). For this reason, the 1972 overhaul of the Clean Water Act charted a bold new course for protecting the quality of the nation's waters by requiring technology-based permits for any discharge of any pollutant into waters of the United States.

The new NPDES permitting program was designed "to set and enforce standards to abate and control water pollution" through two major changes, "[f]irst, the [amended statute] . . . aimed at achieving maximum 'effluent limitations' on 'point sources,' as well as achieving acceptable water quality standards[,]" and second, the discharger's performance

was "measured against strict technology-based effluent limitations. . . ." *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976).[2] In particular, the statute charges EPA with the responsibility for determining "best available technology" for the control of toxic and other non-conventional pollutants and "best conventional pollutant control technology" for conventional pollutants such as organic wastes, and for converting these determinations into effluent limitation guidelines for particular industrial categories. 33 U.S.C. § 1311(b)(2)(A) & (E), 1314(b). Each state must also adopt local water quality standards to achieve the statute's overarching mandate, taking into consideration public health and designated uses, including the need for public water supplies, the propagation of fish and wildlife, and recreational, agricultural, industrial, navigational and other purposes. 33 U.S.C. § 1313(c). EPA regulations unequivocally mandate that "[i]n no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States." 40 C.F.R. § 131.10.

Permitting agencies translate the EPA technology-based guidelines into actual discharge limits in individual NPDES permits. If technology-based

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[2] For a more comprehensive discussion of the Clean Water Act's various provisions, see Ralph L. Stephenson & James W. Blackburn, *The Industrial Wastewater Systems Handbook* 12 (1998), *available at* http://books.google.com/books?id=4TX_WImt4zwC&printsec=frontcover#PPP1,M1.

effluent limitations are insufficient to meet state water quality standards, permitting agencies must incorporate more stringent water quality-based effluent limits into individual NPDES permits. Thus, the NPDES program is the heart of the modern Clean Water Act, and it serves as the primary tool through which effluent limitations, standards of performance, and water quality requirements are implemented. *See Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489 (9th Cir. 1984). Forty-six states and one territory have been delegated authority by EPA to issue NPDES permits.[3]

Congress intended the NPDES program to be technology-forcing and expected that pollution levels would decrease as treatment technologies improved. Accordingly, the Clean Water Act mandates that EPA's assessment of available control technologies be revisited, and where appropriate strengthened, "at least annually." 33 U.S.C. § 1314(b). Similarly, EPA must review and revise technology-based effluent limitations every five years. 33 U.S.C. § 1311(d). And

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[3] *See* EPA, *State Program Status*, *available at* http://cfpub.epa.gov/npdes/statestats.cfm. The Clean Water Act not only allows states to administer the NPDES in lieu of the federal government, 33 U.S.C. § 1412(b); 40 C.F.R. Part 123, it also allows them to set more stringent standards to meet local water quality concerns. 40 C.F.R. § 131.4. Many states have taken advantage of this opportunity. *See, e.g.*, Pennsylvania Department of Environmental Protection, *Report on Water Quality Management Regulations with Provisions More Stringent Than Federal Requirements* (1995), *available at* http://www.dep.state.pa.us/dep/subject/rbi/federal.htm.

finally, individual NPDES permits for ongoing industrial discharges must be reviewed and renewed at least once every five years and are expressly subject to anti-backsliding provisions that prohibit the use of less stringent standards in subsequent permits. 33 U.S.C. § 1342(b)(1)(B) & (o)(1). Through this carefully crafted process, dischargers must satisfy increasingly stringent technology-based controls and effluent limitations, in an effort to achieve the Acts zero-discharge goal. *See Natural Res. Def. Council v. Train*, 510 F.2d 692, 707 (D.C. Cir. 1975); *see also* S. Rep. 92-414, 1972 U.S.C.C.A.N. 3668, 3701 (1971) ("[T]he program established by this section requires increasingly tougher controls on industry; . . . industry will be required every five years to re-evaluate its control efforts and to apply the best technology then available. . . .").

Another important aspect of the NPDES program is its incorporation of data collection and disclosure requirements. EPA must establish monitoring and reporting requirements to ensure that permittees consistently comply with effluent limitations, standards, and permit conditions. 33 U.S.C. § 1318(a). Dischargers must prepare and maintain records and reports, sample effluent, and allow entry by EPA or the state permitting agency, all for the purpose of ensuring compliance with the Clean Water Act. *Id.* Each NPDES permit must incorporate these requirements. 33 U.S.C. § 1342(a)(2); 40 C.F.R. §§ 122.41(j) (monitoring and recordkeeping) & 122.42(a) (additional

reporting requirements for manufacturing, commercial, mining, and silvicultural dischargers). The resulting information is generally available to the public, 33 U.S.C. § 1318(b), which can enforce NPDES permit standards, if necessary, through the statute's citizen suit provisions. *See* 33 U.S.C. § 1365(a)(1)(A) & (f)(6).

B. Section 404 Functions Differently from Section 402 by Employing a "Practicability" Standard and Applying a Hierarchy of Avoidance, Minimization, and Mitigation Rather than Strict Pollution Control Technologies.

By contrast, section 404 establishes a narrowly tailored permit program intended to apply not to industrial pollutant discharges, but rather to earth moving activities that may physically alter and thereby adversely affect the nation's waters. As it considered path-breaking water pollution control legislation in 1972, Congress was aware that dredge and fill activities presented a different threat than industrial discharges. *See, e.g.*, 117 Cong. Rec. 38,797, 38,853 (Nov. 2, 1997), *reprinted in* 1 Sen. Comm. On Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 ("CWA Leg. Hist."), at 1386 (statement by senator who introduced section 404 provision noting that "[o]ne of the main deficiencies of this bill is that it treats dredged materials the same as industrial waste, sewage, sludge, or refuse introduced into a river system, lake estuary or ocean. The disposal of

dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another.").[4] Congress also was "uniquely aware" that the Corps historically had authority to regulate dredging, filling, and construction in navigable waterways of the United States under section 10 of the Rivers and Harbors of 1899, 33 U.S.C. § 403, and it "did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed." Conf. Rep. No. 92-500, *reprinted in* CWA Leg. Hist. at 177. Thus, Congress carved out a limited exception to the NPDES permit program for such earth moving activities by creating the separate section 404 permit process. *See* Michael Hollins, *Addition by Removal? National Mining Limits Section 404 Control of Construction in Wetlands,* 14 J. Land Use & Envtl. L. 341, 345-48 (1999) (explaining that section 404 was intended as a narrow exception to section 402).

Section 404 functions quite differently from section 402. Significantly, it is administered primarily

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[4] This statement is not necessarily correct as a factual matter because, as we have learned, dredged and fill material can contain harmful pollutants, but it demonstrates that Congress intended section 404 as a limited carve-out from the broader section 402 permitting scheme. Congress understood that sections 301 and 404 are intended to control movement of dredged material within a waterbody, as well as the introduction of fill material from outside a waterbody. In addition to destroying and altering the receiving water, both dredged and fill material can result in significant pollution in downstream waters by causing sediment, turbidity, and other impairments.

by the Corps, an agency whose historic expertise lies in engineering, navigation, and flood damage protection, not pollution control. Although EPA is the agency responsible for ultimately ensuring that Corps-issued permits comply with the Clean Water Act and has supervisory authority to review section 404 permits issued by the Corps, 33 U.S.C. § 1344(c), an interagency agreement makes clear that only those specific individual permit decisions that involve "aquatic resources of national importance" will be elevated for formal EPA review, and even that limited review involves a cumbersome multi-step administrative process. *Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army* (Aug. 11, 1992) at Part IV(1).[5] Moreover, while roughly 1,640,000 section 404 applications were submitted between 1979 and 2005, EPA utilized its section 404(c) veto authority only 11 times, with virtually all of these vetoes occurring in the 1980's. EPA, *Clean Water Act Section 404(c) "Veto Authority."*[6] Earlier this year, EPA finally issued one additional veto for a project that would have drained and damaged at least 67,000 acres of wetlands in northwest Mississippi, bringing the total to 12 permit vetos in 36 years.[7]

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[5] *Available at* http://www.usace.army.mil/cw/cecwo/reg/mou/epa404q.htm#3.

[6] *Available at* http://www.epa.gov/owow/wetlands/pdf/404c.pdf.

[7] *See* EPA, *Chronology of 404(c) Actions*, http://www.epa.gov/owow/wetlands/regs/404c.html.

Similarly, while the Clean Water Act allows partial delegation of the section 404 program to the states, only two states have assumed such responsibility. 33 U.S.C. § 1344(g) (allowing delegation for waters other than, *inter alia*, "those waters which are presently used, or are susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce"); 40 C.F.R. §§ 230.70-.71 (partially delegating section 404 permit authority to Michigan and New Jersey). Thus, the section 404 program is implemented largely by an agency within the Department of Defense, rather than by state or local water quality officials. The Corps has been widely criticized for its poor implementation of the section 404 program, and for inadequate enforcement of section 404 permits.[8]

Moreover, because earth moving and land conversion activities do not readily lend themselves to end-of-pipe technology controls and because section 404 is not intended to regulate industrial pollutants, the dredge and fill program does not use "best available" control

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[8] *See, e.g.*, GAO, *Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure that Compensatory Mitigation is Occurring* 2 (2005) (concluding that "parts of the guidance [for compensatory mitigation] are vague or internally inconsistent" and that the Corps districts visited by the GAO "performed limited oversight to determine the status of compensatory mitigation."); GAO, *Report to Congressional Requesters, The Scope of Section 404 Program Remains Uncertain* (1993) (noting significant continuing problems with Corps enforcement of the program); GAO, *The Corps of Engineers' Administration of the Section 404 Program* (1988) (same).

strategies, effluent limitations, and standards of performance. Instead, section 404 discharge requirements are uniquely designed to protect water quality and aquatic habitat from the impacts of dredge and fill activities. Section 404(b)(1) permit guidelines allow the Corps to issue permits only where there is no "practicable alternative" that would cause less damage to the aquatic ecosystem. These guidelines also prohibit, *inter alia*, discharges of dredged or fill material where the discharge would have unacceptable impacts on water quality, violate toxic standards or prohibitions under the Act, have unacceptable impacts on endangered species, or violate requirements that protect marine sanctuaries. 40 C.F.R. § 230.10.[9]

Once the Corps decides that a permit can be issued, the agency must ensure that "appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). As interpreted by the Corps and EPA, the guidelines require (1) avoidance of impacts to the maximum extent practicable, (2) minimization of unavoidable impacts where "appropriate and practicable," and finally (3) compensatory mitigation for unavoidable impacts, in that order. *Memorandum of Agreement Between The Department of Army and The Environmental Protection Agency Concerning the Determination of*

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[9] *Available at* http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf (FY 2003); http://www.usace.army.mil/cw/cecwo/reg/2002webcharts.pdf (FY 2001 and FY 2002).

Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).[10] The guidelines make no mention of the new standard performance requirements of section 306 for the simple reason that section 404 is not intended to regulate the type of sources – such as wastewater from froth-flotation processes – subject to those requirements.

Despite these guidelines, actual implementation of the section 404 program has proven less than adequately protective of our Nation's waters. Corps practice indicates that it pays little adherence to avoidance of impacts. Although the agencies have a "goal" of "no net loss of wetlands functions and values,"[11] they have admitted that application of the "appropriate and practicable" standard in any particular instance "may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts." *Id.* In 2001, the National Research Council concluded that "[t]he goal of no net loss of wetlands is not being met for wetland functions by the [section 404] mitigation program, despite progress in the last 20 years." National Research Council, *Compensating for Wetland Losses Under the Clean Water Act* 2 (2001). Scientists have found that "the section 404 permitting

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[10] *Available at* http://www.usace.army.mil/cw/cecwo/reg/mou/mitigate.htm.

[11] There is no similar "no net loss" goal for impacts permitted to other waters of the United States under the 404 program.

program has been fostering an 80 percent net loss of wetlands." R. Eugene Turner, et al., *Count It by Acre or Function – Mitigation Adds Up to Net Loss of Wetlands,* National Wetlands Newsletter, November-December 2001. There is no indication that the Corps' implementation of the section 404 program is achieving any better results for other waters, such as lakes and streams.

In short, section 404, which the Corps itself acknowledges "was intended by Congress to provide a vehicle for regulating materials whose effects include the physical conversion of waters to non-waters," 65 Fed Reg. 21,292, 21,293 (Apr. 20, 2000), does not provide the regulatory structure to effectively safeguard the nation's waters from discharges of industrial pollutants or move us toward the statutory goal of eliminating such discharges.

C. The Corps' Approach in This Case Marks a Radical Departure From Congressional Intent and Past Agency Practice.

1. Congress, the Corps, and the Courts Have All Recognized the Distinction Between Mining Process Wastes and Fill.

While section 404 plays an important role in regulating the discharge of dredge and fill material, it was never meant to regulate contaminated wastewater from mining or other industrial processes. One of Congress' principal goals in enacting the Clean

Water Act was to eliminate the ongoing practice of using lakes and rivers for waste disposal. *See* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable."). As Respondents explain in their brief, Congress recognized that the disposal of mining wastes was part of the problem, and it intended that the industrial pollution controls articulated for the first time in the 1972 amendments to the Clean Water Act would apply to such disposal activities, including specifically the disposal of slurried mine tailings similar to the waste stream that will be produced at Kensington Mine. *See* Brief of Respondents' at 40-44 (discussing congressional intent to preserve EPA's enforcement claims in *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975) when section 402 permits replaced discharge permits under section 13 of the Refuse Act, 33 U.S.C. § 407).

The process mining wastes discharged into Lake Superior in *Reserve Mining* and the froth-flotation process wastes to be disposed into Lower Slate Lake in this case are similar to each other and categorically distinct from the mine "overburden" at issue in such mountain-top removal cases as *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003). That case involved burying valley waterways with rock and soil left over from the strip

mining process.[12] Because the material was *not* the result of a chemical process regulated by an applicable effluent guideline, *Kentuckians* did *not* raise the issue of whether section 404 was appropriate for the discharge of toxic mine waste slurries that are subject to national standards of performance.

In *Kentuckians,* the Corps argued that section 404 regulations were "designed to address changes that convert waters of the U.S. to dry land" whereas the focus of section 402 is on "wastewater from industrial operations." *Id.* at 446 ("Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself.") (quoting 65 Fed. Reg. at 21,293). The Fourth Circuit upheld as permissible the Corps' definition of "fill material" to mean "all material that displaces water or changes the bottom elevation of a water body *except for 'waste' – meaning garbage, sewage, and effluent that could be regulated by ongoing effluent limitations as described in § 402.*" *Id.* at 448 (emphasis added). Thus, *Kentuckians* (and the Corps) recognized that industrial waste subject to section 402 effluent limitations is not "fill" within the meaning of section 404.

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[12] *Amici* agree with the district court in *Kentuckians* and strongly oppose the issuance of section 404 permits for the disposal of mine overburden in U.S. waters as such disposal activities cannot meet the standards applicable to the issuance of such permits.

While the proposed Kensington Mine discharge will raise the bottom elevation of Lower Slate Lake by over 50 feet, JA 519a, thereby smothering benthic habitat and decimating ecological function, it *also* will have the effect of dramatically degrading water quality through the introduction of harmful industrial pollutants, pollutants whose discharge is limited by an applicable standard of performance. *Id.* 192a. In fact, nearly all aquatic life in the lake will be destroyed by the effects of the discharge, and it is not clear that a functional ecosystem can ever be restored. *Id.* 522a. The Kensington Mine discharge will use a natural lake as a disposal site for contaminated *industrial process wastes*. Petitioners' approach thus threatens to return the nation to the days when polluters deliberately used our public lakes and rivers as private dumping grounds – a practice that served as one of the key drivers for the 1972 revamping of the Clean Water Act.

2. EPA Has Long Recognized that Discharges from the Industrial Processing of Mining Wastes Are Subject to Section 306 and Section 402 of the Clean Water Act.

Until now, the federal agencies have not disputed that mining process waste slurries constitute industrial discharges subject to effluent limitations and the NPDES permit program, even if they also contain solids that may physically alter waters of the United States. In 1982, EPA exercised its authority under

section 306 of the Clean Water Act to establish a "no discharge" standard of performance for process wastewater into waters of the United States from new mills that use froth-flotation for beneficiation of gold ore – precisely the process at issue here. 40 C.F.R. § 440.104(b)(1). Congress directed EPA to impose the most stringent technology-based effluent limitations, called standards of performance, under section 306 because "[n]ew facilities have the opportunity to implement the best and most efficient. . . . wastewater technologies," including technologies applicable to ore mining and mill processes. 47 Fed. Reg. 25,682, 25,696 (June 14, 1982). Section 306 standards of performance must reflect "the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants." 33 U.S.C. § 1316(a)(1). Once a standard of performance is adopted, all new sources must comply; there are no variances available. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1985).

EPA has expressly recognized that the froth-flotation standard, like other section 306 standards of performance and section 301 effluent limitations, is implemented for individual mining and mill operations through NPDES permits issued by state permitting authorities or EPA under section 402. 47 Fed. Reg. 54,598, 54,606 (Dec. 3, 1982). The subsequent

effort by EPA and the Corps to clarify the definition of "fill material" did not alter this fact or negate the applicability of sections 306 and 402 to mine process wastewater. In the preamble to the final rule, the agencies stated unequivocally that, "[n]or does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA." 67 Fed. Reg. 31,129, 31,135 (May 9, 2002). Since EPA determined that a zero-discharge standard was achievable for new froth-flotation gold processing facilities more than two and a half decades ago, the Corps has never attempted to issue a section 404 permit for such an operation – until the Kensington Mine project.[13]

In sum, the issuance of a section 404 permit for the discharge of industrial mining process wastes into waters of the United States is a startling departure from the Corps' and EPA's prior interpretations and past actions. It also flies directly in the face of section 306, which (when combined with the existing standard of performance for this industry) unambiguously prohibits the discharge of wastewater from new gold ore froth-flotation processing facilities into waters of

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[13] The Corps occasionally grants section 404 permits to mining operators for construction of man-made tailings ponds when that construction impacts waters and wetlands under the Corps' jurisdiction. However, section 404 permits do not authorize the introduction of mining waste slurries into waters of the United States; a separate section 402 permit is required for that discharge activity.

the United States. Accordingly, the court of appeals' decision should be affirmed.

II. PETITIONERS' NEW INTERPRETATION OF SECTION 404 VIOLATES THE CLEAR LANGUAGE OF THE CLEAN WATER ACT AND UNDERMINES THE ACT'S BASIC REGULATORY FRAMEWORK.

Beyond allowing the pollution of Lower Slate Lake, the Corps' approach in this case threatens to fundamentally alter and weaken the long-standing Clean Water Act regulatory structure by blurring the distinction between the section 402 and section 404 programs across many industrial categories, not just the mining industry. Moreover, a reversal of the decision below will undermine the principles of cooperative federalism embedded in the Clean Water Act by shifting responsibility for implementation and enforcement of discharge standards that affect water quality away from state and local agencies.

A. Applying Section 404 to Industrial Waste Discharges Directly Conflicts With Sections 306 and 402 and Would Allow Many Mining and Other Industrial Wastes to Avoid Effluent Limitations.

Petitioners' and the Corps' interpretation of the Clean Water Act threatens to fundamentally alter the regulation of this country's industrial process

discharges, including but not limited to mining wastes. Their expansive view of section 404 could allow toxic and other industrial pollutants from whole categories of regulated industries to escape section 306 standards of performance and NPDES effluent limitations merely because a facility's waste stream also contains sediment or settleable solids. Some industrial facilities may even have an incentive to add sand or other solids to their waste in order to invoke the section 404 process and thereby to evade the more stringent and more appropriate standards applicable under section 402. *See* 33 U.S.C. § 1342 (exempting discharges authorized under section 404 from the section 402 permit requirements). At the very least, a reversal of the lower court's clear decision would blur the regulatory line and open the door for industry to argue in every close case that the Corps should have authority to permit industrial wastewater discharges, rather than complying with applicable standards enforced via the section 402 permitting program.

Most obviously at risk are waters currently protected by existing standards for the mining of ore and the subsequent processing of such metals as titanium, platinum, iron, and mercury, including the froth-flotation gold mining process at issue here. *See* 40 C.F.R. Part 440. Standards for coal mining, which apply to coal preparation plants and associated areas, acid or ferruginous mine drainage, postmining areas, coal remining, and western alkaline coal mining, would also be implicated. *See* 40 C.F.R. Part 434.

Other effluent limits and standards of performance apply to approximately 20 subcategories of mineral mining related activities, including the mining of crushed stone, sand and gravel, borax, phosphate rock, sodium sulfate, and several other minerals. *See* 40 C.F.R. Part 436. If Petitioners' interpretation prevails in this case, there is little to stop facilities engaged in each of these mining categories from seeking a section 404 dredge and fill permit for their industrial process waste streams in lieu of meeting more protective section 306 and section 402 requirements.

But well beyond mining operations, most industrial discharges contain solids that are regulated under the section 402 program. Many of the other 50-plus categories of point sources for which the EPA has promulgated standards and guidelines over the years discharge effluent with high solids content. For example, the EPA has promulgated standards for 12 subcategories of dairy products processing, 40 C.F.R. Part 405; 10 subcategories of grain mills, 40 C.F.R. Part 406; three subcategories of cement manufacturing, 40 C.F.R. Part 411; 9 subcategories of leather tanning and finishing, 40 C.F.R. Part 425; 16 subcategories of timber products processing, 40 C.F.R. Part 429; and 12 subcategories of meat and poultry products processing, 40 C.F.R. Part 432. These and other categories of discharges typically contain high volumes of solids. *See, e.g.*, 51 Fed. Reg. 24,974, 24,988 (July 9, 1986) (explaining treatment technology to address excess solids in dairy products processing); 67

Fed. Reg. 8,582, 8,590, 8,595-97 (Feb. 25, 2002) (noting that untreated wastewater from meat and poultry facilities contains high concentrations of solids and that primary treatment technology focuses on the removal of floating and settleable solids).

Altogether, more than 65,000 industrial and municipal sources are regulated under NPDES permits and subject to technology-based effluent limitations or standards of performance. *See* EPA, *Technical Support Document for the 2004 Effluent Guidelines Program Plan* (2004) at 4-6.[14] To the extent that these discharges arguably may alter the bottom elevation of a receiving water, countless facilities could seek the shelter of section 404 dredge and fill permits in lieu of their present section 402 permits. Even if such efforts were ultimately unsuccessful in some cases, the regulatory signal sent by Petitioners' and the Corps' new interpretation of the "fill material" rule is likely to generate significant future uncertainty and litigation by blurring the long-standing demarcation between the Clean Water Act's two distinct permitting programs.

The incentive created by this new interpretation undermines decades of EPA effort to reduce industrial discharges of solids and sediments, which are problems in their own right. Sediments like sand, silt, and clay are among the greatest threats to water quality

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[14] *Available at* http://www.epa.gov/guide/304m/tsd.pdf.

in the United States.[15] *See* Bernard J. Nebel & Richard T. Wright, *Environmental Science: The Way the World Works* 281 (1993). In addition to blocking out light, and thus limiting photosynthesis, sediments that settle along the bottom of a water body smother organisms and bury habitat. *Id.* Sediments critically affect fisheries and drinking water, causing over $16 billion in environmental damage annually. *See* Mid-America Regional Council, *What is Sediment Pollution?*[16]

A major category of pollutant regulated under the NPDES program is total suspended solids ("TSS"). 40 C.F.R. § 401.16; defined in 40 C.F.R. Part 136. Suspended solids are considered pollutants because of their adverse effects on water quality, particularly the impacts of turbidity on fish. *See* Neville Ward, *The Problem of Sediment in Water for Fish* 2 (1992).[17] Under sections 301 and 306, EPA has promulgated dozens of effluent limitation guidelines and standards of performance covering TSS for a wide range of

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[15] EPA defines sediment as "[p]articulate organic and inorganic matter that accumulates in a loose, unconsolidated form on the bottom of natural waters." EPA, *EPA Terminology Services, available at* http://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do.

[16] *Available at* http://www.epa.gov/nps/toolbox/other/KSMO_Sediment.pdf.

[17] *Available at* http://www.mnr.gov.on.ca/MNR_E005389.pdf.

industrial sources and discharges,[18] including mining slag and tailings.[19] *See, e.g.*, 40 C.F.R. § 421.244

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[18] Examples of EPA effluent limitations that restrict total suspended solids include: Grain Mills, 40 C.F.R. § 406.16; Aluminum Smelting, 40 C.F.R. § 421.22; Copper Refining, 40 C.F.R. §§ 421.52, 421.54; Lead Manufacturing, 40 C.F.R. §§ 421.72, 421.132, 421.134; Zinc Manufacturing, 40 C.F.R. § 421.84; Metallurgic Acid Plants, 40 C.F.R. §§ 421.92, 421.94; Tungsten Manufacturing, 40 C.F.R. §§ 421.102, 421.104; Columbium-Tantalum Manufacturing, 40 C.F.R. §§ 421.112, 421.114; Silver Manufacturing, 40 C.F.R. §§ 421.122, 421.124; Antimony Manufacturing, 40 C.F.R. §§ 421.142, 421.144; Beryllium Manufacturing, 40 C.F.R. §§ 421.152, 421.154; Germanium and Gallium Manufacturing, 40 C.F.R. §§ 421.182, 421.184; Indium Manufacturing, 40 C.F.R. § 421.194; Mercury Manufacturing, 40 C.F.R. § 421.204; Molybdenum and Rhenium Manufacturing, 40 C.F.R. §§ 421.212, 421.214; Molybdenum and Vanadium Manufacturing, 40 C.F.R. §§ 421.222, 421.224; Nickel and Cobalt Manufacturing, 40 C.F.R. §§ 421.232, 421.234; Nickel Manufacturing, 40 C.F.R. § 421.244 (slag tailings); Precious Metals and Mercury Manufacturing, 40 C.F.R. §§ 421.252, 421.254; Precious Metals Manufacturing, 40 C.F.R. §§ 421.262, 421.264; Rare Earth Metals, 40 C.F.R. § 421.274, Tantalum Manufacturing, 40 C.F.R. §§ 421.282, 421.284; Tin Manufacturing, 40 C.F.R. §§ 421.292, 421.294; Titanium Manufacturing, 40 C.F.R. §§ 421.302, 421.304; Tungsten and Cobalt Manufacturing, 40 C.F.R. §§ 421.312, 421.314; Uranium Manufacturing, 40 C.F.R. §§ 421.322, 421.324; Zirconium and Hafnium Manufacturing, 40 C.F.R. §§ 421.332, 421.334; Timber Products Processing, 40 C.F.R. § 429.111; Coal Mining, 40 C.F.R. Part 434, App. B; and Ferroalloy Slag Processing, 40 C.F.R. § 424.32.

[19] The Compact Oxford Dictionary defines "slag" as "stony waste matter separated from metals during the smelting or refining of ore." *The Compact Oxford Dictionary* (3d ed.), *available at* http://www.askoxford.com/concise_oed/slag. "Tailings" is defined by EPA Terminology Services as "[r]ock and other waste materials removed as impurities when minerals are mined and mineral deposits are processed." EPA, *EPA Terminology Services*,

(Continued on following page)

(nickel slag tailings); 40 C.F.R. § 421.222, § 421.224 (molybdenum and vanadium tailings). TSS limitations generally require the reduction of solids before a waste stream is discharged into waters of the United States, and they often require the *complete* removal of all suspended solids from new point sources[20] – precisely the opposite result achieved by the Corps' new expansive interpretation of section 404. Dischargers currently subject to TSS limitations would have every incentive to circumvent those limitations through a request for a section 404 permit in place of their NPDES permit.

B. Applying the Section 404 Permitting Scheme to Industrial Waste Discharges Undermines the Role of the States in the Section 402 Permitting Program and Reallocates Power to the Federal Government, Contrary to Congress' Explicit Intent.

As the Court has noted, the Clean Water Act expressly establishes that it is the "'policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . . .'" *Rapanos v.*

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available at http://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do.

[20] *See, e.g.*, Aluminum Smelting, 40 C.F.R. §§ 421.24, 421.34 (setting discharge level for TSS at zero); Lead Manufacturing, 40 C.F.R. § 421.74 (same).

United States, 547 U.S. 715, 737 (2006) (plurality opinion) (quoting 33 U.S.C. § 1251(b)). In the decades since Congress penned those aspirational words, the section 402 permit program has blossomed into a successful example of cooperative federalism, with EPA setting minimum national discharge standards and 46 states using their delegated NPDES permit authority to implement and, where appropriate, augment those standards to protect local water quality for a variety of desired human and ecological uses. The section 404 permit program has taken the opposite path; as explained above, the Corps makes most permitting decisions with little involvement from EPA, state and local officials, or the public.

If widely adopted, the Corps' approach at the Kensington Mine facility threatens to shift significant responsibility for water quality protection from the state and local level to the federal government. At the very least, mining facilities will have an incentive to move away from the section 402 program and into the shelter of section 404 permits; if other industrial facilities follow suit, states will be forced to relinquish their primary authority for setting and enforcing effluent limits and managing local water quality through the NPDES permit system.

III. KENSINGTON MINE HAS VIABLE ALTERNATIVES TO DISPOSING INDUSTRIAL WASTE IN NATURAL LAKES.

Petitioners and their supporting *amici* present the Court with a false dilemma – either allow disposal of the froth-flotation process waste into Lower Slate Lake and destroy the ecosystem or force Kensington Mine to comply with the law and destroy the business. In fact, conventional methods for disposing of mining waste that do not violate the Clean Water Act exist and are used in many other places. These include "dry stacking," paste disposal, and artificial ponds that operate as waste treatment facilities for the harmful pollutants contained in process wastewater. Some of these alternatives were considered by, and even supported by, the Kensington Mine project proponent.

A. Dry Stacking

The original plan for the Kensington Gold Mine, submitted to the EPA in 1997, proposed the construction of a "dry tailings facility" – also known as "dry stacking" – which would have dewatered the process wastewater and placed the solid tailings in a dry facility on land. JA 165a. Eventually, the dry tailings would be covered and restored to support natural vegetation. The EPA determined in 1997 that this disposal plan was environmentally preferable to lake disposal. *Id.* 211a-212a. Petitioner Ceour Alaska had received a permit from the Corps and EPA for the dry tailings facility, and its plan of operations was

approved by the U.S. Forest Service in 1997. *Id.* 165a. After a decline in gold prices, however, the company terminated its dry tailings plan and sought a cheaper way to dispose of its wastewater. *See Southeast Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 641 (9th Cir. 2007).

B. Paste Disposal

After losing the appeal below, Coeur Alaska entered into negotiations with Respondents, mediated by the mayor of Juneau, to explore alternative disposal methods that would not violate the Clean Water Act. The parties agreed to a solution that would deposit the tailings as "paste" near Alaska's Lynn Canal without discharging any process wastewater into waters of the United States. Similar to dry stacking, paste disposal methods involve surface disposal of mine wastes, but allow for pumping of mud-like tailings. This alternative disposal approach was submitted to EPA for the Kensington Mine in January 2007. When this Court granted Petitioners' petition for certiorari, however, Coeur Alaska dropped its pursuit of the alternate permit.[21]

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[21] *See* Press Release, Coeur d'Alene Mines (Sept. 23, 2008), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=86472&p=irol-newsArticle&ID=1200286; *see also Mine Gives Up Permits Pursuit*, SpokesmanReview.com, Sept. 26, 2008, http://www.spokesmanreview.com/business/story.asp?ID=262171.

C. Man-Made Holding Facilities for Mine Tailings

Man-made holding facilities, often referred to as man-made or artificial ponds, have been a conventional storage method for slurried mining waste for the last 30 years and are used widely in Alaska. This alternative, however, was never considered or proposed in Coeur Alaska's application for a permit from the Corps and EPA. These holding facilities for mine tailings are constructed specifically as waste treatment facilities for mining discharges where the refuse material is ponded to allow the settlement of solid particles from the water it is carried in. *See* Hossein et al., *A Brief Survey of Current Surface Waste Disposal Practices in the Metal Mining Industry*, 7 Int'l J. Mining, Reclamation, & Env't 23 (1993). The ponded water stores the toxic chemicals used in froth-flotation processes and contained in the resulting slurry. Mine operators using man-made holding facilities must obtain a section 404 permit if the construction will require dams, diversions, or will otherwise affect waters of the United States. However, a section 402 permit is required if the holding facility will discharge the treated material into a natural water body to ensure that any such discharge complies with the Clean Water Act's effluent limitations and standards of performance.

The practice of using man-made holding facilities for mining waste is similar to practices used to contain contaminated dredged material. While non-industrial dredge and fill activities require a section

404 permit, if the sediments contain other pollutants, such as heavy metals, EPA requires a section 402 permit implementing technology-based standards for any discharge into a natural body of water. *See* K.R. Demars et al., *Dredging, Remediation, and Containment of Contaminated Sediments* 195-96 (1995). Coeur Alaska's proposal is thus unlike the standard methods for disposing of mine processing wastes or the standard methods for treating contaminated dredged material.[22] It runs counter to the Clean Water Act and threatens to turn back the clock on more than three decades of water quality improvement.

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[22] The key point is that natural waters of the United States cannot properly be used as a treatment facility for industrial waste, as proposed by Coeur Alaska. Instead, Coeur Alaska could create an artificial holding facility in an upland area not connected to or created from natural waters of the United States.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Respondents' and other supporting *amicus* briefs, the decision below should be affirmed.

Dated: November 14, 2008

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AMICUS CURIAE BRIEF

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Nos. 07-984 and 07-990

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In The
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COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE COUNCIL OF ALASKA PRODUCERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. IMPLEMENTATION OF THE NINTH CIRCUIT'S RULING IN ALASKA WOULD HAVE FAR-REACHING, UNINTENDED IMPACTS ON CURRENT AND FUTURE MINING PROJECTS	6
A. The Long History of Wetlands Regulation in Alaska Cannot be Ignored	7
B. The Implications of the Ninth Circuit's Holding on Alaska are Substantial as No Legal Difference Exists Between Lakes and Wetlands under the Clean Water Act	11
II. IMPLEMENTATION OF THE NINTH CIRCUIT'S RULING WOULD CURTAIL MINING OPERATIONS IN ALASKA IMPACTING ESSENTIAL COMMUNITY AND ECONOMIC DEVELOPMENT IN RURAL AREAS	13
A. Mine Tailings Cannot Meet Clean Water Act Section 402's Effluent Limitation Guidelines	14
B. Upland Stacking of Mine Tailings on Converted Wetlands is Not Feasible in Many Circumstances	15

TABLE OF CONTENTS – Continued

Page

C. The Practical Impact of the Ninth Circuit Rule Would Frustrate the Goals of the Alaska Statehood Act 16

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531 (1987) 19

Astoria Fed. Sav. & Loan Assoc. v. Solimino, 501 U.S. 104 (1991) 16

Rapanos v. United States, 547 U.S. 715 (2006) 11, 12

Trustees for Alaska v. State, 736 P.2d 324 (Alaska 1987) 20, 22

Udall v. Kalerak, 396 F.2d 746 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969) 19

United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980) 19

STATUTES

Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 343, July 7, 1959 ..... 2, 17, 19

Clean Water Act, 33 U.S.C. § 1311 2

Clean Water Act, 33 U.S.C. § 1316 2

Clean Water Act, 33 U.S.C. § 1342 ..... *passim*

Clean Water Act, 33 U.S.C. § 1344 ..... 4, 8

REGULATIONS

40 C.F.R. § 440.104(a) (2007) 6

TABLE OF AUTHORITIES – Continued

Page

RULES

104 Cong. Rec. 9,340 (1958) 21

104 Cong. Rec. 9,360 (1958) 19

104 Cong. Rec. 9,361 (1958) 18, 19

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104 Cong. Rec. 12,012 (1958) 19

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104 Cong. Rec. 12,035 (1958) 22

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TABLE OF AUTHORITIES – Continued

Page

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Report of the 2008 Alaska Minerals Commission, https://www.commerce.state.ak.us/oed/minerals/pub/mineralsreports2008_web.pdf 10

U.S. Army Corps of Engineers, Regional Supplement to the Corps of Engineers Wetlands Delineation Manual: Alaska Region (Version 2.0) (September 2007) 8, 10

U.S. Environmental Protection Agency, et al., *Alaska Wetlands Initiative Summary Report* (1994) 7, 8

INTEREST OF *AMICUS CURIAE*[1]

The Council of Alaska Producers ("CAP") is an association representing major companies involved in the exploration, development, and active operation of hard rock mines in Alaska. The mining industry in Alaska produces not only vital resources for the Alaskan economy, but also serves as an important source of jobs and economic opportunities in rural and remote areas of Alaska. In 2007, the Alaska mining industry provided over 5,500 direct and indirect jobs, constituting a payroll of $340 million. Alaska Native corporations benefit significantly from mining industry activity on their land, both in terms of jobs for shareholders and through direct payments for leases of land. *See* Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry*, at 1 (January 2008).[2]

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[1] This *amicus* brief is filed with the consent of the parties. All petitioners and respondents aside from the United States have filed letters with the Clerk of the Court consenting to the filing of *amicus* briefs in accordance with the Court's Rule 37.3(a). Respondent United States' letter of consent is filed with the Clerk of the Court herewith. Pursuant to Rule 37.6, the amicus submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

[2] *Available at* http://www.alaskaminers.org/mcd07sum.pdf.

The CAP is committed to sound operating practices, protection of the environment, and growth of an industry that has the potential to provide much-needed private sector economic diversification throughout Alaska. Its members work closely with the State of Alaska and the Federal Government to promote practices that foster the environmentally-sound development and use of mineral materials. It is also engaged regularly in the progression of social causes, such as through litigation that raises environmental issues of concern to the Alaska mining community.

The CAP has a substantial interest in this case. The Ninth Circuit's decision substantially impacts mining activity in Alaska. If permitted to stand, many mines in Alaska would be forced to cease storage of mine tailings in vast areas near mining projects because mine tailings by their very nature cannot meet Clean Water Act Section 301 effluent limitations (33 U.S.C. § 1311) and Clean Water Act Section 306 new source performance standards (33 U.S.C. § 1316) promulgated by Environmental Protection Agency under Section 402 of the Clean Water Act, 33 U.S.C. § 1342. The Ninth Circuit's holding, if left standing, could result in the closure of mines in remote areas of Alaska, resulting in the loss of jobs and economic opportunities in this otherwise barren region. This result is not dictated by the Clean Water Act and indeed contradicts the requirements of the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 343, July 7, 1959. Both the U.S. Army Corps of Engineers

("Corps") and the Environmental Protection Agency ("EPA") recognized the realities facing the mining industry in promulgating the regulations and issuing the permits at issue. Unfortunately, the Ninth Circuit ignored the practical reality that mines in Alaska face when constructing and operating facilities in this area of the country and failed to harmonize the Clean Water Act with the Alaska Statehood Act. This Court should reverse the Ninth Circuit's ruling, and defer to the expertise of the Corps and EPA, which have developed a regulatory regime that addresses the relevant environmental concerns raised in this case.

STATEMENT OF THE CASE

The facts of this case demonstrate the need for deference to a reasonable interpretation of statutory terms – such as that provided by the Corps and EPA in this case.[3] The Corps and EPA, unlike the Ninth Circuit, focused on the practical implications of Clean Water Act regulations carefully balancing the environmental and economic implications of the Clean Water Act and the Alaska Statehood Act.

For over 30 years, the Corps and EPA have permitted the discharge of mine tailings into waters of the United States, including Arctic tundra and

[3] The facts summarized here are those set forth in, *inter alia*, the opinions of the District Court and the Ninth Circuit on *de novo* review.

other wetlands, pursuant to Clean Water Act Section 404 (33 U.S.C. § 1344). As described by the District Court, the novel question presented in this case is whether the Corps and EPA erred in permitting a mining company to discharge about 4.5 million tons of solid mine tailings into a remote Alaska lake, where the lake would be used as a storage facility impounding the tailings. Reclamation of the lake, including capping of tailings, is required as part of the project. Permitting requirements would insure that the lake would recover over time, providing at least equivalent aquatic habitat and productivity to that which currently exists. Ultimately, water released from the tailings impoundment into downstream receiving waters would be treated in a manner that would meet Clean Water Act Section 402 requirements. Thus, the lake in question would serve to isolate deposited tailings from the environment and would be subject to strict monitoring and reclamation requirements that meet congressional standards.

SUMMARY OF ARGUMENT

The Court should reject the appellate ruling below because the Ninth Circuit failed to consider the practical implications of its ruling on mines in Alaska, and the impending result, which Congress did not intend when enacting the Clean Water Act and the Alaska Statehood Act. The Corps and EPA have, in the light of many years of experience and

practical knowledge, fashioned a regulatory framework that both protects the environment and permits responsible development of Alaska lands and the extraction of important mineral resources. The Ninth Circuit's ruling imperils this legislative balance.

The Ninth Circuit failed to consider how the hardrock mining process is conducted in remote, inaccessible locations such as Alaska. As described by the Ninth Circuit, mine tailings are nothing more than ground up rock and earth. During the process of separating ore from this ground up rock, mined rock and earth are combined with water and chemicals to separate out ore-bearing materials. This paste-like material is sometimes placed in upland areas where it is dried out in a process called "dry stacking"; however, in many locations in Alaska, placement of tailings in upland areas is simply not feasible given the location of mining facilities, the prevalence of wetland areas in the State, and economic considerations associated with management of large quantities of tailings materials in remote locations.

By their very nature, mine tailings consist of ground up rock and particles of smaller sizes. Constituent elements of mine tailings, such as sediment materials, often exceed the Section 402 standards with which the Ninth Circuit's interpretation would require compliance. Practically speaking, it would not be possible to place most typical mine tailings on vast wetland areas in Alaska under the Ninth Circuit's rule as they would at a minimum exceed limits placed

on total suspended solids. *See* 40 C.F.R. § 440.104(a) (2007).

The Ninth Circuit failed to consider that both the Corps and EPA have developed a program to manage mine tailings in places such as Alaska in a manner that balances environmental protection with the need to foster economic development in rural areas. Under the Corps' regulations, the Corps grants permits for tailings placements *only* under stringent environmental and practicability criteria, and *only when* they will be deposited into secure impoundments that have been engineered and strictly designed for storage. Reclamation, remediation and monitoring requirements associated with these Corps permits ensure the long-term protection of the environment.

ARGUMENT

I. IMPLEMENTATION OF THE NINTH CIRCUIT'S RULING IN ALASKA WOULD HAVE FAR-REACHING, HARMFUL IMPACTS ON CURRENT AND FUTURE MINING PROJECTS

The Corps and EPA have worked for years to develop a balanced approach to dealing with wetlands issues in Alaska. The Federal Government has long recognized the fact that Alaska is different when it comes to regulating wetlands in this region of the country. The Ninth Circuit failed to carefully consider the agencies' considerable expertise in this area, or

the practical implications of its ruling, in overturning the agencies' Clean Water Act regulations concerning placement of mine tailings.

A. The Long History of Wetlands Regulation in Alaska Cannot be Ignored

Alaska is replete with many small, remote lakes and wetland areas that could be subject to regulation under the Clean Water Act. Alaska possesses about 175 million acres of wetlands, comprising about 43 percent of the surface area of the State – more wetlands acreage than the rest of the United States combined. *See* U.S. Environmental Protection Agency, et al., *Alaska Wetlands Initiative Summary Report*, at 2 (1994).[4] About 66 percent of the wetlands in Alaska are found within Federally-managed land, about 23 percent within State lands, about 11 percent under Native ownership,[5] and less than 1 percent of these wetlands under private ownership. *Id.*

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[4] *Available at* www.epa.gov/owow/wetlands/pdf/alask.pdf (last visited September 21, 2008).

[5] The Federal government has long recognized the significance of wetlands regulation in Alaska. As discussed *infra*, the Alaska Statehood Act is intended to provide a mechanism for selecting certain Federally-owned lands for economic development and community expansion, as well as rural Alaska's needs for basic services and facilities, subsistence rights, and Capital Improvement Projects. The Ninth Circuit's ruling effectively ignores years of dialogue and agreements made between various stakeholder groups concerning the implementation of Clean

(Continued on following page)

A review of the percentage of wetland by geographic region shows the concentration of wetlands in different parts of the State. The areas with the highest percentage of wetlands are also the areas most likely to have active mines or mineral projects. The Corp issued wetlands delineation guidelines specific to Alaska in September 2007, which explain the distribution of wetlands in the State:

> Wetlands occupy an average of 61 percent of the Northern and Western Alaska. They are least abundant in the Brooks Range . . . and most abundant . . . (up to 83 percent of the land area) in the arctic foothills and coastal plain, and in the Yukon-Kuskokwim and Selawick-Kobuk deltas. More than half of all Alaska's wetlands are located in the Northern & Western subregions. . . . Approximately 44 percent of Interior Alaska is wetlands. . . .

U.S. Army Corps of Engineers, Regional Supplement to the Corps of Engineers Wetlands Delineation Manual: Alaska Region (Version 2.0), at 4-6 (September 2007) ("Delineation Guidelines").[6] A map illustrating the Corps' delineation appears at page 5 of the Delineation Guidelines ("Corps Map").

Water Act Sections 402 and 404 in Alaska. *See, e.g., Alaska Wetlands Initiative Summary Report*, at 27-28.

[6] *Available at* http://handle.dtic.mil/100.2/ADA473823 (last visited September 21, 2008).

Because 43 percent of Alaska's land mass is classified as wetlands, all mining projects encounter wetlands. What makes the Ninth Circuit's decision particularly harmful to Alaska is that the majority of non-coal mines in Alaska are located in the subregions of Alaska with the highest concentration of wetlands. The majority of non-coal mines in Alaska are located in the Northern, Western, and Interior subregions. *See Alaska Department of Natural Resources, Division of Mining, Land & Water*, Large Mine Permitting, http://www.dnr.state.ak.us/mlw/mining/largemine/index.htm (last visited September 21, 2008). There are eleven non-coal mines in Alaska listed on the Division of Mining, Land & Water's index. Eight of the locations are in the Northern, Western, or Interior subregions. *See* Corps Map. The remaining three mines are located in the Southeast subregion. Eight out of eleven mines or large projects are located in the subregions of Alaska with the highest concentration of wetlands. As the Corps Map illustrates, the Northern, Western, and Interior subregions contain the majority of the land mass in Alaska. The Northern and Western subregions contain over half of Alaska's wetlands, but have less than half of Alaska's land mass. Any mine or project in the Northern or Western subregion is likely to encounter a very high percentage of the affected land being classified as wetlands. The two mineral projects mentioned by Petitioner State of Alaska in their Brief for the Petition for Certiorari, are in the Western subregion. Reply Br. for Pet. State of Alaska for Pet. for Cert. at 7 & n.2. These are projects that the State

anticipates may face Clean Water Act tailings disposal issues similar to those faced by the Kensington project. The Western subregion has a higher percentage of wetlands compared to the Southeast subregion, the location of the Kensington project. *See* Delineation Guidelines at 6. Thus, the next two likely large mining projects in Alaska will have even less land available for alternatives that avoid wetlands.

When the geographic analysis is expanded to include producing mines, developing projects and significant exploration projects, the relationship between areas of wetlands concentration and significant mineral deposits is closer. The Alaska Minerals Commission identified 27 such projects. *See* Report of the 2008 Alaska Minerals Commission.[7] The Alaska Minerals Commission developed a map showing the geographic location of each project in its 2008 report ("AMC Map"). Of the seven developing mineral projects and producing mineral projects for non-coal resources, five are located in one of the Western, Northern or Interior subregions. Of the twenty-six significant exploration projects for non-coal minerals, twenty four are in the Western, Northern and Interior subregions. The AMC Map shows that significant mines are widely disbursed in Alaska. Active large-scale mining occurs as far north and west as the Red

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[7] http://www.commerce.state.ak.us/oed/minerals/pub/minerals report2008_web.pdf (last visited September 21, 2008).

Dog Mine, as far east as the Pogo Mine, and as far south as the Greens Creek Mine.

B. The Implications of the Ninth Circuit's Holding on Alaska are Substantial as No Legal Difference Exists Between Lakes and Wetlands under the Clean Water Act.

While the facts in this case are somewhat unusual, its implications in Alaska are far-reaching. The Clean Water Act extends to not just traditional navigable waters (such as lakes) but also to all wetlands or streams with a "sufficient nexus" to navigable waters to affect their "integrity." *Rapanos v. United States*, 547 U.S. 715, 781-82 (2006) (Kennedy, J., concurring in the judgment). Thus, most Alaska wetlands become subject to the Ninth Circuit's interpretation of the Clean Water Act, making such areas off limits to the deposition of mine tailings because such tailings could never meet Clean Water Act Section 402 requirements. The implications for the mining industry in Alaska and the resource and economic benefits that flow from the industry are staggering.

As the Court in *Rapanos* observed, to determine whether wetland areas fall under the jurisdiction of the Clean Water Act, a party must determine, in the first instance, whether the areas in question are "waters" in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the

wetlands in question are "adjacent" to these "waters" in the sense of possessing a continuous surface connection. *Rapanos*, 547 U.S. at 742. In this sense, whether or not an area contains open water or wetland bears little on whether an area constitutes Federally-regulated wetland under the Clean Water Act.[8]

The Ninth Circuit's rule effectively swallows vast areas of Alaska and renders it technically impossible to place mine tailings in a broad range of areas, even if such areas are highly remote, and do not contain open water or a lake environment. Such a result is particularly problematic in view of the over 30 years of placement of tailings in such wetland areas, and ongoing monitoring and restoration activities associated with these areas under the regulatory schemes developed by the Corps and EPA. The Ninth Circuit's ruling would also likely significantly impact Alaska's mining industry, making various large mining projects infeasible or highly problematic without justification or root in congressional intent.

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[8] Justice Scalia's opinion in *Rapanos* recognized the complexity and ambiguity involved in making such determinations. 547 U.S. at 727-29 (describing Corps' variable enforcement practices based on vague definitions). This burden is borne heavily by the applicant or party. *Id.* at 721 (reciting burden imposed for permitting and enforcement actions under Clean Water Act).

II. IMPLEMENTATION OF THE NINTH CIRCUIT'S RULING WOULD CURTAIL MINING OPERATIONS IN ALASKA IMPACTING ESSENTIAL COMMUNITY AND ECONOMIC DEVELOPMENT IN RURAL AREAS

Most large mine projects in Alaska are located in highly remote, rural areas with limited access. The remoteness of these locations adds to project costs and makes mining processes technically difficult to conduct. Of the five developing mineral projects and producing mineral projects on the AMC Map in the Western, Northern, or Interior subregions, four projects are not located on the road system in Alaska. The producing mines required construction of lengthy trajectories to the road system or to port facilities and the developing projects will require the same effort. Of the 26 significant exploration projects, 21 are not located near the road system in Alaska. Lack of road access is one factor that makes mining projects in Alaska more expensive than other parts of the United States. Regulations requiring significant additional costs have a negative impact on the feasibility of a mine in Alaska.

The location of large mines in and around wetland areas presents significant challenges for mining companies attempting to avoid placement of tailings on tundra or other areas that typically constitute jurisdictional wetlands. Application of Clean Water Act Section 402 to tailings placement in Alaska would have far-reaching economic and practical impacts

which Congress did not intend and the Ninth Circuit failed to consider in overturning the agencies' Clean Water Act regulations.

A. Mine Tailings Cannot Meet Clean Water Act Section 402's Effluent Limitation Guidelines.

The Ninth Circuit's statutory construction of the Clean Water Act renders tailings ponds not permittable under the Clean Water Act in a wide range of situations. That is because EPA has promulgated effluent limitation guidelines for a vast number of substances commonly present in the excess rock and dirt from mines located throughout the country. As discussed above, mine tailings by their very nature contain high levels of total suspended solids and other process materials. It is for this very reason that mining operators seek to find practicable locations to store these materials, where such storage areas can be capped and isolated from the local environment. Under the Ninth Circuit's reading of the Clean Water Act, the tailings produced by all such mines in Alaska would be subject to effluent limitations, even though mine tailings cannot possibly meet those limitations and despite the ability of mining companies to effectively cap, contain, and restore tailings ponds.

B. Upland Stacking of Mine Tailings on Converted Wetlands is Not Feasible in Many Circumstances.

One potential solution posited to avoid placement of mine tailings in low lying wetland areas is to "dry stack" tailings in upland areas. Dry stacking is a process whereby tailings are unsaturated, moved by a conveyor or truck, and stacked in a designated area, for example, a converted wetland. *See* Mining Foundation of the Southwest, "New Environmental Management: Dry Tailings – An Alternative to Conventional Tailings Management," 2 Natural Resources Impact, No. 3 (2006).[9]

The remoteness, topography, climate, and presence of wetlands in Alaska makes it extremely difficult, if not impossible, to implement the dry stacking technique in most areas of Alaska. The Alaskan landscape, where large mining operations occur, is so heavily dotted with wetlands and streams that it is virtually impossible to avoid these areas. Furthermore, given extreme precipitation, including high snowfall and related runoff during spring breakup, placing tailings in upland areas presents potentially significant economic[10] and technical challenges for many large mines. Conversely, a tailings impoundment

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[9] *Available at* http://www.mge.arizona.edu/pdf/MFSW_vol2_no3_ver1.pdf?PHPSESSIDD=bec59fef13c91fd3c649f66b0c6f4aa6.

[10] Coeur Alaska, Inc.'s Pet. for Writ of Cert. Reply Br. at 9 (comparing cost of storage on converted wetlands to cost of storage as allowed by the Corp permit for Kensington Mine).

constructed in low-lying areas such as those containing wetlands is technically and economically efficient to implement. Such an impoundment is securely walled off – and it ensures that the solids and minerals in the tailings will not flow into a nearby water supply.

It makes no sense to uphold a ruling of the Court of Appeals which overturns a disposal practice permitted and approved by the Corps and EPA for many years for an alternative method of disposal that is less technically and economically efficient without significant gain for the goals of the Clean Water Act.

C. The Practical Impact of the Ninth Circuit Rule Would Frustrate the Goals of the Alaska Statehood Act.

Upholding the Ninth Circuit's view of the Clean Water Act is inconsistent with Congressional intent that Alaska be permitted to develop its mineral resources in order to support state government. *See Astoria Fed. Sav. & Loan Assoc. v. Solimino*, 501 U.S. 104, 109 (1991) (recognizing harmonization of different statutes is core principle of statutory interpretation). Faced with congressional opposition to statehood because of concerns about Alaska's economy and the potential need for subsidization, Congress specifically provided support for development of Alaska natural resources in approving Statehood. The Ninth Circuit's holding undermines Congress' intent to support Alaska resource development.

During the debates leading to the enactment of the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 343, July 7, 1959, one of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government. For example, opponents of statehood claimed that "Alaska is not capable of sustaining statehood unless it is heavily subsidized by the other 48 States of the Union." 104 Cong. Rec. 9,498 (1958) (statement of Rep. Smith). Similarly, another opponent of statehood argued that "[t]he prevailing doubt of Alaska's ability to support itself is evidenced by the generous special considerations which are made for it in this statehood act." 104 Cong. Rec. 12,297 (1958) (statement of Sen. Talmadge).

The congressmen who favored statehood conceded that it would impose an additional financial burden on the territory, but they maintained that the Statehood Act sufficiently provided for Alaska's financial wellbeing. A healthy minerals industry was seen as a necessity to meet the economic challenge of statehood. Two provisions of the Statehood Act were designed specifically to assist the Alaska minerals industry: Sections 6(a) and 6(i) of the Act. Together these sections of the Act provided a very generous land grant to the State (the right to select 103,350,000 acres of land) and the requirement of a leasing system for minerals disposition from this

land. The land grant of 103,350,000 acres was perceived by these congressmen as an endowment which would yield the income that Alaska needed to meet the costs of statehood. Representative Dawson said that:

> All grants include the mineral rights, but these rights must be retained by the State if the lands pass into private ownership. In other words, the mineral rights will always belong to the people of Alaska, and never to private individuals. . . .
>
> These provisions are the foundation upon which Alaska can and will build to the enormous benefit of the national economy shared by her sister States. We cannot make Alaska a "full and equal" State in name and then deny her the wherewithal to realize that status in fact.

104 Cong. Rec. 9,361 (1958).

The importance of mineral revenue to the new state is also highlighted by the following colloquy between Representative Miller and Alaska Territorial Senator William Egan:

> Miller: Do you see where you would get much income out of this 103 million acres you might select around, bearing in mind most of the forests and good land has been set aside by the Government now, or by the military? How much income would you derive from that to begin with?

> Egan: As to how much income would be derived, that would be entirely problematical, depending on the values that would be found there. . . . There are known deposits of almost every type of mineral.
>
> . . .
>
> I feel there would be development. . . .

Statehood for Alaska: Hearings Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 85th Cong., 1st Sess. 201-02 (1957) (remarks of Rep. Miller and William Egan, Alaska Territorial Senator and President of the Alaska Constitutional Convention); *see also* 104 Cong. Rec. 9,360-61 (1958) (further remarks of Rep. Dawson; remarks of Rep. O'Brien); 104 Cong. Rec. 12,012 (1958) (remarks of Sen. Jackson).

Congress passed the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 343, on July 7, 1959. Following a Declaration from President Eisenhower in early January 1959, Alaska joined the Union.

The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state. *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969); *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1016, 1021 n.47 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980); *see also Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 549 & n.17 (1987) (public land

allocation began with the Alaska Statehood Act). There is little case law exploring the purpose of sections 6(a), 6(b) and 6(i) of the Alaska Statehood Act. In addition to the broad statements about Congressional purpose in these two cases, there is a decision of the Alaska Supreme Court, *Trustees for Alaska v. State*, 736 P.2d 324 (Alaska 1987), that focuses specifically on the reasons for sections 6(a), 6(b) and 6(i) in the Statehood Act. The House Report summarizes the purpose of the selection rights in section 6(i) of the Statehood Act:

> If the resources of value are withheld from the State's right of selection, such selection rights would be of limited value to the new State. The committee members have, therefore, broadened the right of selection so as to give the State at least an opportunity to select lands containing real values instead of millions of acres of barren tundra. To attain this result, the State is given the right to select lands known or believed to be mineral in character (sec. 6(i)).

H.R. Rep. No. 624, 85th Cong., 1st Sess. (1957), *reprinted in* Vol. 1, Alaska Statutes, "History of Alaska Statehood," at 7 (2006).

The grant ultimately provided in sections 6(a) and (b) of the Statehood Act was one of unprecedented size whether considered either absolutely or as a percentage of the total land area of the State. *Id.* As the colloquy between Representative Miller and William Egan suggests, another rationale for the

unprecedented size was that the federal government had already reserved the most valuable land and the new state would, in effect, have second choice. In the House, Representative Saylor said that "the choice areas, more than 95 million acres, have been reserved for Federal agencies." 104 Cong. Rec. 9,340 (1958). In Senate discussion of the federal reservations, Senator Robertson read a portion of the House report on the Act: "[T]his tremendous acreage of [federal] withdrawals might well embrace a preponderance of the more valuable resources needed by the new State to develop flourishing industries with which to support itself and its people." 104 Cong. Rec. 12,019 (1958). Thus, the large grant of 103 million acres was deemed necessary because the lands available for state selection were perceived to be only marginally productive.

Furthermore, Congress recognized that the agricultural potential of the statehood grant land was limited. In debate, Senator Byrd commented: "In all of the more than 365 million acres of land in Alaska, only 2 million, or about one-half of 1 percent, are arable." 104 Cong. Rec. 12,336 (1958). Because Congress realized that agricultural development would not yield the revenue that Alaska would need to support statehood, the Act contained the provision granting the new state title to the mineral estate underlying the land grants. Senator Kuchel said in debate:

> I believe, however, on the basis of the values of property in Alaska as they have been estimated, the tremendous wealth in the ground in minerals, . . . the State of Alaska will be able to make maximum use of the property which it will obtain under the bill from the Federal Government. This provision constitutes one additional assurance. I feel sure that economically the new government will succeed.

104 Cong. Rec. 12,035 (1958).

Thus, Congress recognized that the large statehood land grant and the grant of the underlying mineral estate were important means by which the new state could meet the financial burdens of Statehood. Congress granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government. *See id.* The leasing restriction in section 6(i) was intended to further the goal of state revenue production. *See Trustees for Alaska v. State*, 736 P.2d at 335-337.

Congressional assumptions regarding the value of mining to Alaska have borne out to be true. The mining industry contributed $4 billion to Alaska's economy in 2007, consisting of $275 million in exploration, $274 million in development, and $3.4 billion in gross mineral production value. Mot. for Leave to File Br. Amicus Curiae and Br. Amicus Curiae of Pacific Legal Foundation, et al. at 7-11 (citing to Alaska Miners Association, *The Economic Impacts of*

Alaska's Mining Industry (2008)).[11] The mining industry paid corporate income taxes and mining license taxes of $150 million to the State of Alaska in fiscal year 2007. *See* Alaska Department of Revenue Tax Division, *Revenue Sources Book* (Fall 2007) at 19, Fig. 3.3.[12] Upholding the Ninth Circuit would have the effect of substantially curtailing the availability and use of lands in Alaska for mining because, as discussed above, it would be impossible in many cases for large mines in remote areas to dispose of mine tailings in an economic fashion. This would significantly restrict industrial development on these lands contrary to congressional intent as set out in the Alaska Statehood Act.

Achieving the goals, as expressed by the congressional intent, of the Clean Water Act and the Alaska Statehood Act, is the task of the agencies that regulate water quality in this country. The Corps and the EPA have achieved a program for regulation of mine tailings that balances the goals of the Alaska Statehood Act and the Clean Water Act. In this matter, the Corps issued a permit for tailings storage at the Kensington Mine in Alaska that is consistent with the agencies' program. The agencies developed the

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[11] *See also* Coeur Alaska, Inc.'s Pet. for a Writ of Cert. at 19-20 (mineral industry production in Alaska and other states); State of Alaska Pet. for a Writ of Cert. at 29-30, n.8 (employment growth in mining industry in Alaska).

[12] *Available at* https://www.tax.alaska.gov/programs/documentviewer/viewer.aspx?255.

program and worked though the application of the program for many years.[13] In absence of specific Congressional intent disallowing the longstanding program, this Court should recognize the expertise of the agencies by reversing the decision of the Court of Appeals for the Ninth Circuit.

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[13] State of Alaska Pet. for a Writ of Cert. at 6-10 (explanation of the history of the adoption of the Army Corp regulations allowing the permit issued for the Kensington Mine); Coeur Alaska, Inc.'s Pet. for a Writ of Cert. at 29-30.

CONCLUSION

Given the unique geographical and economic landscape of Alaska, the Ninth Circuit's decision thwarts the purpose of the Alaska Statehood Act, Congress' intent in enacting the Clean Water Act, and the EPA and Corps' practical and experience-laden interpretations of the Clean Water Act. For these reasons, Amicus CAP asks the Court to overturn the Ninth Circuit's ruling and affirm the District Court below.

Respectfully submitted,

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September 24, 2008

AMICUS CURIAE BRIEF

Nos. 07-984 and 07-990

In The Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE HONORABLE G. TRACY MEHAN, III, FORMER ASSISTANT ADMINISTRATOR FOR WATER AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTRODUCTION AND INTEREST OF THE AMICUS CURIAE 1

STATEMENT 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE LANGUAGE, STRUCTURE, AND PURPOSES OF THE CLEAN WATER ACT REQUIRE THAT THE PROCESS WASTEWATER DISCHARGES FROM THE KENSINGTON MINE BE SUBJECT TO THE MANDATORY NEW SOURCE PERFORMANCE STANDARDS 7

A. Section 306 Imposes Mandatory Pollution Control Obligations 7

B. Section 402 Effectuates the Mandatory Applicable Treatment Standards 9

1. Section 402 is the Proper Permitting Mechanism for Coeur Alaska's Proposed Discharge 11

2. Section 404 Cannot Be Used to Exempt This Facility from Mandatory NSPS 14

3. The EPA and Corps' Definition of Fill Cannot and Should Not Be Read As Displacing the Clear Statutory Commands of the Clean Water Act 17

TABLE OF CONTENTS – Continued

Page

C. Petitioners' Statutory Claims Misunderstand the Relationship Between Sections 402 and 404 28

II. DISCHARGE REQUIREMENTS ESTABLISHED BY REGULATION CANNOT BE MODIFIED IN PERMITS 30

A. This Court Rejected a Similar, But Less Extreme, Argument in *E. I. du Pont de Nemours & Co. v. Train* 30

B. Allowing the Secretary to Confer Unbridled Exemptions Through Section 404 Would Render Congress' Carefully-Defined Statutory Variances Superfluous 33

III. EXEMPTING THE PROPOSED DISCHARGES FROM NSPS VIOLATES FUNDAMENTAL STATUTORY GOALS 37

A. Allowing This Discharger to Evade the NSPS Would Contravene the Zero Discharge Goal 37

B. The Exemption Granted Here Defeats the Uniformity Mandated by Congress, and Unfairly Favors Some Sources Over Others 38

TABLE OF CONTENTS – Continued

Page

C. Allowing Untreated Discharges to Destroy a Pristine Lake Makes a Mockery of the Statutory Objective to Restore and Maintain the Integrity of the Nation's Waters 39

CONCLUSION 41

TABLE OF AUTHORITIES

Page

CASES

Am. Frozen Food Inst. v. Train, 539 F.2d 107 (D.C. Cir. 1976) 35

Am. Iron and Steel Inst. v. EPA, 568 F.2d 284 (3d Cir. 1977) 9, 31

Am. Iron and Steel Inst. v. EPA, 115 F.3d 979 (D.C. Cir. 1997) 10

Am. Paper Inst. v. Train, 543 F.2d 328 (D.C. Cir. 1976) 13

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 5, 12, 40

Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D.W. Va. 1999) 24, 25

Chem. Mfrs. Ass'n v. EPA, 870 F.2d 177 (5th Cir. 1989) 32

Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116 (1985) 36, 38, 39

Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984) 17

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) 11

E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977) ..... *passim*

EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200 (1976) 12

EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64 (1980) 12, 34, 38

TABLE OF AUTHORITIES – Continued

Page

Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) 29

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 26

Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304 (1981) 7, 12

Minnesota by Spannaus v. Hoffman, 543 F.2d 1198 (8th Cir. 1976) 10

Pub. Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989) 17

PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700 (1994) 40

Res. Invs. Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162 (9th Cir. 1998) 19, 20

Riverkeeper, Inc. v. EPA, 358 F.3d 174 (2d Cir. 2004) 36

Rybachek v. EPA, 904 F.2d 1276 (9th Cir. 1990) 13

U.S. Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977) 13

United States v. Johnson, 529 U.S. 53 (2000) 33, 34

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 40

Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) 13, 35, 39

White v. United States, 543 F.3d 1330 (Fed. Cir. 2008) 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. § 706 17

33 U.S.C. § 1251(a) 37, 40

33 U.S.C. § 1251(d) 15

33 U.S.C. § 1311(a) 5, 7

33 U.S.C. § 1311(b) 7, 8

33 U.S.C. § 1311(c) 34

33 U.S.C. § 1311(e) 8

33 U.S.C. § 1311(g) 35, 36

33 U.S.C. § 1311(n) 36

33 U.S.C. § 1316 ..... 8, 9 16, 37

33 U.S.C. § 1317 8

33 U.S.C. § 1328 6

33 U.S.C. § 1342(a) 10, 14

33 U.S.C. § 1342(b) 14

33 U.S.C. § 1342(k) 14, 16

33 U.S.C. § 1343(c) 15

33 U.S.C. § 1344(a) 10, 15

33 U.S.C. § 1344(b) 15

33 U.S.C. § 1344(p) 16

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS AND REGULATORY MATERIALS

33 C.F.R. § 323.2(e) (2000) 19

33 C.F.R. § 323.2(e) (2008) 17

40 C.F.R. § 232.2 (2000) 19

40 C.F.R. § 232.2 (2008) 17

40 C.F.R. § 440.104(b)(1) (2008) 2, 9, 28

Kensington Venture Gold Mine Project, AK, Tongass National Forest-Chatham Area, Juneau Ranger District, 54 Fed. Reg. 43,189 (Oct. 23, 1989) 3

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (May 9, 2002) 22, 23, 24, 26

Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (Dec. 3, 1982) 2

Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge Fill Material," 65 Fed. Reg. 21,292, 21,294 (Apr. 20, 2000) 19, 20, 22 25, 26

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Clean Water Act Definition of Fill Hearing Before Subcomm. on Clean Air, Wetlands, and Climate Change of the S. Comm. on Environment and Public Works, 107th Cong. (Testimony of Benjamin H. Grumbles, Deputy Assistant Administrator, Office of Water, United States Environmental Protection Agency and George S. Dunlop, Deputy Assistant Secretary of the Army (Policy and Legislation)) (June 6, 2002), *available at* http://epw.senate.gov/107th/Grumbles_060602.htm.....19, 21, 24

H.R. Rep. No. 92-911, at 76-77 (1972) (Conf. Rep.).....40

H.R. Rep. No. 95-830, at 105 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4480 15

Qs and As on the "Fill" Rule at 2, http://www.usace.army.mil/cw/cecwo/reg/fillqas.pdf.....24

S. Rep. No. 92-414, at 76 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742 .....35, 40

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL RESOURCE DOCUMENT EXTRACTION AND BENEFICIATION OF ORES AND MINERALS: GOLD, Vol. 2 1-59 (Aug. 1994), *available at* http://www.epa.gov/osw/nonhaz/industrial/special/mining/techdocs/gold/goldch1.pdf.....27

INTRODUCTION AND INTEREST OF THE AMICUS CURIAE

The parties' consent to the filing of this brief was filed with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Amicus Curiae G. Tracy Mehan, III, has held several positions in which he was charged with implementing the Clean Water Act (CWA) and its various programs. From 2001 to 2003, Mr. Mehan served as the Assistant Administrator for Water at the United States Environmental Protection Agency (EPA). Accordingly, Mr. Mehan has a keen interest in ensuring that the integrity of the statutory structure of the Clean Water Act is preserved. Most importantly here, because he was in charge of the office that developed the "fill" rule at issue in this case, Mr. Mehan is interested in seeing that the rule is properly understood and implemented.

STATEMENT

1. In 1982, the EPA promulgated new discharge standards for facilities engaged in mining

[1] In accordance with Supreme Court Rule 37.6, Amicus Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amicus Curiae, has made a monetary contribution specifically for the preparation or submission of this brief.

and processing of metal ores. *See* Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (Dec. 3, 1982). Under those rules, the standard for all new mines that use a froth-flotation milling process to extract gold allows no discharge of process water into navigable waters, unless certain narrow exceptions apply. *See id.* 54,602-03 (explaining that certain discharges are allowed to specified limits where contaminants build up in recycled water and in excess rainwater and runoff). The EPA found that, by 1982, existing mills were achieving zero discharge "through total recycle and evaporation of process wastewater." *Id.* at 54,602. Because New Source Performance Standards (NSPS) "are based on the best available demonstrated technology" and "[n]ew plants have the opportunity to install the best and most efficient production processes and wastewater treatment technologies," *id.* at 54,600, the EPA concluded that it was appropriate to require new mills to meet a standard that was being met by a majority of existing mills, *id.* at 54,602. Moreover, the agency concluded, based on evidence that "[m]ills currently achieving zero discharge are located in areas ranging from flat to extremely steep and mountainous," "[z]ero discharge [was] demonstrated for a wide spectrum of topographical constraints." *Id.*

The zero-discharge standard adopted by the EPA in 1982 remains the standard today. *See* 40 C.F.R. § 440.104(b)(1) (2008). As a result, froth-flotation

mills built in the United States since January 17, 1983 (the effective date of the NSPS) that extract gold must use tailings ponds to dispose of process waste.

2. In 1989 – nearly seven years after the EPA promulgated the froth-flotation zero-discharge NSPS – Petitioner Coeur Alaska, Inc. proposed to extract gold from the Kensington Gold Mine in southeast Alaska using a froth-flotation process. *See* Kensington Venture Gold Mine Project, AK, Tongass National Forest-Chatham Area, Juneau Ranger District, 54 Fed. Reg. 43,189 (Oct. 23, 1989). Over the past 20 years, Coeur Alaska has proposed three different methods for disposing of its waste.

In 1990, Coeur Alaska proposed damming a nearby waterway, Sherman Creek, and discharging its process wastewater into the impounded waters. The EPA and the Army Corps of Engineers (Corps) never issued a permit for this proposed discharge. JA 288a-289a; 351a-352a.

In 1996, Coeur Alaska proposed to construct a "dry tailings facility," which would result in the tailings being dried and then contained in an impoundment. Both the Corps and the EPA issued permits to Coeur Alaska for this method of disposal. JA 289a; JA 352a.

In 2004, Coeur Alaska again changed its disposal plan. It proposed to release at least 210,000 gallons – and perhaps as much as 510,000 gallons – of process wastewater per day directly into nearby Lower Slate Lake, a 23-acre subalpine lake. JA 480a; Resps. Br. at

4 & n.2. In order to isolate the waste that would be placed in Lower Slate Lake from surrounding waters, Coeur Alaska would be required to build a 500-foot dam at the lake's outfall as well as a series of diversions, including a ditch through a wetland area and a pipeline to divert Slate Creek around the lake. JA 523a; JA 484a.

If the permits issued in this case are upheld, over the 10 to 15 year projected lifetime of the Kensington mine, millions of gallons of wastewater and approximately 4.5 million tons of solid waste will be dumped into the lake. JA 483a. It is estimated that the discharge will raise the bottom of the lake 50 feet, and will cause the surface area to increase from 23 acres to 62 acres. JA 482a-483a. The discharge will contain significant concentrations of several metals, including aluminum, copper, lead, and mercury; the pH of the effluent will be over 10, which is significantly higher than the current pH of the lake. JA 522a. There is no dispute that "all fish and most other aquatic life (such as macroinvertebrates, periphyton, and zooplankton) in Lower Slate Lake would be lost" during the years of mining operations. JA 197a. Although Coeur Alaska's closure plan includes restoring fish populations to Lower Slate Lake when it ceases mining operations, it is unclear what, if any, restoration will be possible. JA 254a; 202a; 522a.

3. In response to a question about Coeur Alaska's new disposal plan, on May 17, 2004, EPA Division Directors Diane Regas, James A. Hanlon, and Geoffrey H. Grubbs sent a memo to EPA Region

X's Director of the Office of Water, Randy Smith. JA 141a. They wrote that the discharge of the mine waste into Lower Slate Lake fell under section 404 of the Clean Water Act, which meant that the Corps would be responsible for issuing a permit for that discharge. JA 143a. Any other discharges to navigable waters, such as those from the impoundment of Lower Slate Lake, would require a permit from the EPA under section 402 of the Clean Water Act. JA 143a.

In December 2004, the U.S. Forest Service approved Coeur Alaska's revised plan of operations. JA 211a-212a. Consistent with the May 2004 memo's division of responsibility between the Corps and the EPA, in 2005, the EPA issued a permit for three proposed discharges of pollutants, none of which included the discharge of the process mining waste into the Lower Slate. JA 317a-331a. The Corps issued a permit for the discharge of the process wastewater into Lower Slate Lake. JA 266a-86a.

SUMMARY OF ARGUMENT

Section 301(a) of the CWA provides: "Except as in compliance with this section and sections [302, 306, 307, 318, 402, and 404] of this Act, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2002); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992). This section does not require a single discharger to

comply simultaneously with sections 302, 306, 307, 318, 402, and 404. Instead, it requires compliance with all applicable sections of those listed.

The key issue in this case is which of the provisions Congress listed in section 301(a) apply to the proposed discharge into Lower Slate Lake. Some of the listed provisions (the balance of section 301 and sections 302, 306, 307, and 318[2]) impose *substantive* treatment obligations designed to fulfill the statutory goals and purposes, while the remaining two provisions (sections 402 and 404) are permitting devices designed to effectuate the substantive requirements of the statute.

The plain language and structure of the statute requires that the proposed discharge into Lower Slate Lake comply with the NSPS for gold mines using the froth-flotation process, promulgated in 1982 pursuant to section 306. Allowing the proposed discharges to evade mandatory pollution control requirements through the formalism of issuing a permit under section 404, rather than under section 402, ignores plain statutory text and the overall statutory scheme, eviscerates fundamental statutory goals, generates perverse incentives for dischargers, and creates unfair disparities among similar facilities.

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[2] Section 318 applies to aquaculture projects and is not relevant here. *See* 33 U.S.C. § 1328 (2002).

ARGUMENT

I. THE LANGUAGE, STRUCTURE, AND PURPOSES OF THE CLEAN WATER ACT REQUIRE THAT THE PROCESS WASTEWATER DISCHARGES FROM THE KENSINGTON MINE BE SUBJECT TO THE MANDATORY NEW SOURCE PERFORMANCE STANDARDS

A. Section 306 Imposes Mandatory Pollution Control Obligations

Section 301(a) prohibits "the discharge of *any* pollutant by *any* person" except as in compliance with the listed provisions. 33 U.S.C. § 1311(a) (emphasis added); *see Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 310-11 (1981). This conditioned discharge prohibition is the statutory vehicle through which Congress imposed specific treatment obligations, which are designed to become increasingly stringent and ultimately achieve the statutory goal of the complete elimination of discharges. *See E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 118-20 (1977).

Individual dischargers are not subject to all of the substantive control provisions listed in section 301(a) simultaneously because different controls apply to different facilities and in different circumstances. Thus, effluent limitations issued by the EPA pursuant to section 301(b) impose technology-based treatment obligations on *existing sources*, 33 U.S.C.

§ 1311(b),[3] while NSPS issued by the EPA under section 306 impose potentially stricter technology-based treatment obligations on *new sources*, *id.* § 1316.

Each treatment requirement, however, is mandatory with respect to sources to which it applies. Section 301(e) unambiguously provides: "Effluent limitations established pursuant to this section or [section 302] *shall be applied* to *all point sources* of discharge of pollutants in accordance with the provisions of this chapter." *Id.* § 1311(e) (emphasis added). Similarly, section 306 requires: "After the effective date of standards of performance promulgated under this section, it shall be unlawful for *any owner or operator of any new source* to operate such source in violation of any standard of performance applicable to such source." *Id.* § 1316(e) (emphasis added).[4]

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[3] Congress mandated limits based on the "best practicable control technology currently available" (BPT) by 1977, 33 U.S.C. § 1311(b)(1)(A), and stricter limitations based on the "best available technology economically achievable" (BAT) thereafter, *id.* § 1311(b)(2)(A). Intermediary treatment requirements apply to conventional pollutants, based on the "best conventional pollutant control technology." *Id.* § 1311(b)(2)(E).

[4] Likewise, Section 307 requires EPA to adopt mandatory limitations for sources of toxic pollutants: "After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for *any owner or operator of any source* to operate any source in violation of any such effluent standard or prohibition or pretreatment standard." *Id.* § 1317(d) (emphasis added).

Once the proper category is determined for a given source,[5] the mandatory obligation of either section 301(e) or section 306(e) applies. *See Am. Iron and Steel Inst. v. EPA*, 568 F.2d 284, 307-08 (3d Cir. 1977) (invalidating regulation exempting facilities once the EPA promulgated uniform limitations, and holding that limitations apply to *all sources* within the class).

The EPA promulgated NSPS for froth-flotation process gold mines in 1982 and that standard remains in effect. *See* 40 C.F.R. § 440.104(b)(1) (2008). There is no dispute that the Kensington Mine qualifies as a new source and will employ the froth-flotation milling process to extract gold. Under the plain language of section 306(e), it is unlawful for Petitioners to operate in violation of those standards, and it was unlawful for the Corps to issue a permit allowing them to do so.

B. Section 402 Effectuates the Mandatory Applicable Treatment Standards

Sections 402 and 404 are procedural mechanisms designed to implement the substantive requirements of the Act. Congress enacted section 402

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[5] A "new source" is "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. § 1316(a)(2).

to implement, *inter alia*, effluent limitations and NSPS adopted by the EPA. 33 U.S.C. § 1342(a) (2002). This section serves as the principal mechanism for permitting discharges under the Clean Water Act. *See Am. Iron and Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997) ("The centerpiece of the CWA is the NPDES permitting program [of section 402].").

Section 404, on the other hand, applies to a much more limited category of discharges, and is not the mechanism Congress adopted to effectuate effluent treatment standards. *See* 33 U.S.C. § 1344(a) (2002). Congress' principal focus in section 404 was on the ability of the Corps of Engineers to dredge waterways to maintain and improve navigability for commerce, and to permit disposal of the resulting dredged spoils at specified sites. *See Minnesota by Spannaus v. Hoffman*, 543 F.2d 1198, 1203-06 (8th Cir. 1976). As such, section 404 created a separate permitting mechanism for discharges of dredged and fill material, whereas section 402 authorized the EPA and the states to regulate other pollutants. *Id.* at 1208 ("Unlike all other pollutants, dredged spoil is not regulated under the NPDES.").

Petitioners make a "category mistake" in arguing that the agencies must choose between compliance with the applicable NSPS under section 306 and the permitting requirements in section 404. Petr. Coeur Alaska Br. at 22-32; Petr. Alaska Br. at 34-35. The first step under the Act is to identify the substantive treatment requirements that apply to a particular

discharger. Here, section 306(e) plainly mandates that the NSPS for froth-flotation gold mines applies to the proposed Kensington Gold Mine. Next, the agencies must apply the permitting mechanism that properly implements the applicable substantive requirements. Only section 402 does so.[6] The correct statutory construction is one that fully effectuates the law's interlocking provisions. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) ("[The Court] must, if possible, construe a statute to give every word some operative effect.").

1. Section 402 is the Proper Permitting Mechanism for Coeur Alaska's Proposed Discharge

This Court has explained the carefully-designed relationship between the substantive pollution controls in sections 301, 306, and 307 and the permit mechanism in section 402:

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[6] Petitioners argue that their discharges meet the regulatory definition of "fill," and therefore may be permitted under section 404. Assuming they are correct, the discharges would meet *both* the definition of "fill" for purposes of section 404, and the definition of "pollutant" for purposes of section 402. Then Petitioners argue further that section 404 does not by its own terms mandate compliance with section 306, as section 402 does. That difference, however, only confirms that section 402 is the proper permitting provision for this source. As discussed, *infra*, however, the regulatory definition of "fill" cannot and does not cover this discharge.

> [T]he Amendments establish the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations. Under NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards . . . into the obligations . . . of the individual discharger. . . .

EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 204-05 (1976), *superseded by statute on other grounds*, 33 U.S.C. § 1323(a) (2002) (citations omitted); *see also Milwaukee II*, 451 U.S. at 311 (explaining that once the EPA promulgates effluent limitations by regulation, those limitations are incorporated as permit conditions under section 402). In *Milwaukee II*, this Court noted that a section 402 permit "directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Id.* at 318. The permits "incorporate, *as required by the Act*, the specific effluent limitations established by EPA regulations. . . ." *Id.* at 319-20 (emphasis added) (citations omitted); *see also Arkansas v. Oklahoma*, 503 U.S. at 101-02 (stating that section 301(a) prohibits discharges absent an NPDES permit, and the NPDES permit is the primary means of enforcing effluent limitations); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 71 (1980) (interpreting section 402 to require that all dischargers must obtain NPDES permits, which translate

generally applicable effluent limitations into individual obligations of dischargers).

The Courts of Appeals have also explained the relationship between the permit mechanism in section 402 and treatment requirements established by EPA regulations:

> [T]he permit-issuing system established by section 402 of the Act, 33 U.S.C. § 1342, provides a procedure whereby the general effluent limitations for each class of point sources are transformed by EPA, or some EPA-approved state agency, into an authorization for a specific plant or mill to discharge effluents up to specified limits.

Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1020 (D.C. Cir. 1978); *see Rybachek v. EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990) ("Through the Clean Water Act, Congress has directed EPA to incorporate into the permits increasingly stringent technology-based effluent limitations."); *U.S. Steel Corp. v. Train,* 556 F.2d 822, 830 (7th Cir. 1977), *abandoned on other grounds by City of West Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983) (explaining role of NPDES permit to translate generally applicable limitations into obligations of individual dischargers); *Am. Paper Inst. v. Train*, 543 F.2d 328, 334 (D.C. Cir. 1976) ("Primary enforcement of these standards is to be accomplished under Section 402 of the Act. 33 U.S.C. § 1342. This section establishes a permit system as the basic mechanism for enforcing the effluent limitations established under Section 301.").

No opinion except for the District Court decision below mentions the possibility of using section 404 as the permitting mechanism for point sources for which the EPA has adopted effluent limitations or NSPS, and for good reason. Section 402(a) authorizes the EPA to issue NPDES permits "upon condition that such discharge will meet either (A) all applicable requirements under sections [301, 302, 306, 307, and 403] . . . or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this [Act]." 33 U.S.C. § 1342(a) (2002). State NPDES permits must ensure compliance with the same controls. *Id.* § 1342(b)(1). Moreover, the "permit shield" provision in section 402(k) decrees that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance with" the same list of statutory provisions under which the EPA establishes NSPS and other pollutant control obligations. *Id.* § 1342(k).

2. Section 404 Cannot Be Used to Exempt This Facility from Mandatory NSPS

Section 404 applies on its face to a much narrower category of pollutant discharges that are *not* subject to NSPS or other technology-based controls. The presumption that the EPA implements the major pollution control provisions of the statute is underscored in section 101(d) of the Act, which provides: "Except as otherwise *expressly provided* . . . the

Administrator of the Environmental Protection Agency . . . shall administer this [Act]." 33 U.S.C. § 1251(d) (emphasis added). Thus, this Court should be wary of allowing the Secretary of the Army to exempt dischargers from pollution controls promulgated by the Administrator absent an *express provision* to that effect in section 404 or elsewhere in the Act.

Section 404 authorizes the Secretary to issue permits only for a specific subcategory of pollutants, "dredged or fill material," and only to "specified disposal sites." 33 U.S.C. § 1344(a). Although section 404 permits are subject to regulatory guidelines adopted by the EPA, those rules are based on receiving water impacts and other factors rather than uniform, technology-based treatment requirements. *See id.* §§ 1344(b), 1343(c). Section 404 contains no reference whatsoever to effluent limitations or NSPS adopted by the EPA for industrial discharges under section 301 or section 306, and thus is not designed to implement those controls.[7]

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[7] Petitioners argue that section 404 includes references to section 307, but *not* to section 301 or section 306. Petr. Coeur Alaska Br. at 27 n.4; *see* Petr. Alaska Br. at 29 n.6 Congress, however, added references to section 307 to clarify that certain exemptions to section 404 would not apply to any "discharges of dredged or fill material containing toxic pollutants regulated under section 307." H.R. Rep. No. 95-830, at 105 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4480. Likewise, Petitioners assert that the omission in section 404(p) of any reference to section 306 authorized the Corps, by negative

(Continued on following page)

Likewise, the "permit shield" in section 404(p), analogous to the NPDES permit shield in section 402(k), provides that compliance with a section 404 permit "shall be deemed compliance . . . with sections [301, 307, and 403]," but not with the section 306 NSPS to which Petitioners' proposed discharges are subject. *Compare* 33 U.S.C. § 1342(k) *with id.* § 1344(p). The straightforward interpretation of the reference to section 301 is that compliance with section 404 exempts a discharger from the presumptive ban imposed by section 301(a), in parallel with the concomitant reference in section 301(a) to section 404. It is entirely illogical to assume that Congress intended section 404 to implement effluent limitations for existing sources pursuant to section 301(b), but not NSPS for the same categories of industries pursuant to section 306.

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inference, to issue a permit that exempts that discharger from treatment requirements that section 306(e) plainly imposes on "any owner or operator" of a new source. 33 U.S.C. § 1316(e). There is no rational explanation why a discharger permitted under section 402 is subject to the statute's mandatory NSPS while a discharger permitted under section 404 is not.

3. The EPA and Corps' Definition of Fill Cannot and Should Not Be Read As Displacing the Clear Statutory Commands of the Clean Water Act

Petitioners claim that Coeur Alaska's proposed discharge falls within the EPA and Corps' 2002 revised definition of "fill," found in 33 C.F.R. § 323.2(e)(1)(ii) (2008) and 40 C.F.R. § 232.2 (2008), because it will raise the elevation of Lower Slate Lake by 50 feet and is "mining-related slurry." *See* Coeur Alaska Br. at 17. As such, they assert the discharge must be permitted under section 404, not section 402. The fill definition, however, cannot undermine the statutory commands of the Clean Water Act and should not be read to do so.

"[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989), *superseded by statute on other grounds*, Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990); *see* 5 U.S.C. § 706(2)(A), (C) (allowing courts to set aside agency action that are "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations"). Where, as here, the plain language of a statute provides a clear answer, "that is the end of the matter." *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). The statute, not the agency's interpretation, governs. *White v. United States*, 543 F.3d 1330, 1338 (Fed. Cir. 2008) ("The

agency's interpretation must be rejected . . . because the interpretation it advocates would result in a regulation that conflicts with the clear language of the statute. . . . Since the agency interpretation of its regulation would change precisely what Congress has already decided, it must be rejected.").

The agencies' unprecedented interpretation and application of the fill regulation to Coeur Alaska's mining operations in this case contravenes the plain language of the statute. As such, it does not warrant deference of any kind and should be disregarded.

Moreover, when the definition of fill was revised in 2002 – which Mr. Mehan oversaw in his role as the EPA's Assistant Administrator for Water – the agencies never contemplated or intended the unlawful result reached by the agencies here. Because the EPA and the Corps failed to consider the context in which the revision arose, and the purposes for which it was promulgated, they misapplied the fill definition in this case.

Before 2002, the Corps and the EPA defined fill differently. The Corps defined fill as

> any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.

33 C.F.R. § 323.2(e) (2000). The EPA, on the other hand, defined fill as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." 40 C.F.R. § 232.2 (2000).

According to the agencies, these inconsistent definitions – one emphased purpose; the other did not – "resulted in inconsistencies which impede the fair and effective implementation of the CWA in a number of ways." Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge Fill Material," 65 Fed. Reg. 21,292, 21,294 (Apr. 20, 2000); *see also Clean Water Act Definition of Fill Hearing Before Subcomm. on Clean Air, Wetlands, and Climate Change of the S. Comm. on Environment and Public Works*, 107th Cong. (Testimony of Benjamin H. Grumbles, Deputy Assistant Administrator, Office of Water, United States Environmental Protection Agency and George S. Dunlop, Deputy Assistant Secretary of the Army (Policy and Legislation)) (June 6, 2002), *available at* http://epw.senate.gov/107th/Grumbles_060602.htm [hereinafter, *Deputies' Senate Testimony*].

In particular, the agencies pointed to the Ninth Circuit's decision in *Resource Investments Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998), which involved the proposed construction of a solid waste landfill on wetlands that qualified as waters of the United States. The Corps had denied the application for a permit because the applicant "had failed to demonstrate the unavailability of

practicable alternatives for waste disposal that were less environmentally damaging . . . and that the proposed landfill was not in the public interest because it would cause significant degradation of wetlands and posed an unacceptable risk of groundwater contamination." *Id.* at 1165.

When the denial was challenged, the question was whether a 404 permit was required and, if so, whether the denial was proper; no one argued that a 402 permit should be required. The Ninth Circuit concluded that a section 404 permit was *not* required, relying on the Corps definition of fill:

> [T]he layers of gravel and low-permeability soil, as well as the synthetic liner that would underlie the solid waste in [the] proposed landfill, do not constitute fill material because their primary purpose is not to replace an aquatic area with dry land or to change the bottom elevation of a waterbody, *see* 33 C.F.R. § 323.2(e), but rather to serve as a leak detection and collection system.

Id. at 1168.

The agencies therefore proposed in 2000 to revise the definition of fill to address the error of *Resource Investments Inc.* and other cases that excluded certain activities from regulation under section 404. *See* 65 Fed. Reg. at 21,294-95. As Deputies from both the Corps and the EPA explained to the Senate Subcommittee on Clean Air, Wetlands, and Climate Change,

this change was essential to avoid results that would undermine the statute:

> [I]f this approach to interpreting the Corps' "primary purpose test" were to be taken to its extreme conclusion, the unreasonable end result could be that almost any traditional fill material proposed to be placed in waters of the U.S. does not need a Section 404 permit. Such an interpretation would be clearly contrary to the intent of Congress expressed in the plain words of CWA Sections 404 and 301, which require that any "fill material" to be placed in any water of the U.S. must be legally authorized by a permit under CWA Section 404.

Deputies' Senate Testimony.

The agencies also noted that the EPA's then-current definition of fill might create confusion between section 402 and section 404:

> [W]e believe that this definition needs clarification, because, read literally, it could subject to regulation under CWA section 404 certain pollutants that have been, are being, and should be regulated by the technology and water quality based standards used in the section 402 program. For example, industrial waste or sewage may contain suspended solids which ultimately will settle to the bottom following discharge. Although this would not replace waters with dry land, this could have effects on the water body's bottom elevation. *Where such pollutants are*

> *covered by proposed or final effluent limitations guidelines and standards under section 301, 304, or 306 of the CWA or the discharge is covered by a NPDES permit issued under section 402 of the CWA, the proposed rule would exclude the discharge from the definition of fill.*

65 Fed. Reg. at 21,295 (emphasis added). The proposed rule therefore included the following caveat:

> The term fill material does not include discharges covered by proposed or final effluent limitations guidelines and standards under sections 301, 304 or section 306 of the Clean Water Act (see generally, 40 CFR part 401), or discharges covered by an NPDES permit issued under section 402 of the Clean Water Act.

Id. at 21,299.

In the final rule, the agencies deleted this language due to "confusion associated with the proposed provision," largely over whether it referred to effluent standards currently in effect or to ones that would be promulgated in the future. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002). The agencies explained, however, that the deletion had no substantive effect:

> [A]lthough we have removed the language in question from the rule itself, we emphasize that today's rule generally is intended to maintain our existing approach to regulating

> pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. . . . Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.*

Id. at 31,135 (emphasis added).

The Deputies later reiterated that uncertainty expressed over the proposed provision led to its removal but that the agencies did not intend to change the allocation of permitting under sections 402 and 404:

> [W]hile the language in question does not appear in the final rule itself, the preamble does emphasize that the effects-based definition is consistent with EPA's long-standing approach to defining fill material, and generally is intended to maintain our existing

> approach to regulating pollutants under either Section 402 or 404 of the CWA. In particular, as noted in the preamble, the final rule does not change any determination EPA has made regarding discharges that are subject to effluent limitation guidelines and standards, which will continue to be regulated under Section 402 of the CWA.

Deputies' Senate Testimony; see also Qs and As on the "Fill" Rule at 2, http://www.usace.army.mil/cw/cecwo/reg/fillqas.pdf.

Accordingly, Petitioners' attempt to exploit this deletion must fail because it disregards the repeated statements of the agencies that the deletion was not intended to change the regulatory approach under sections 402 and 404.

Petitioners also emphasize that the agencies changed the definition of "fill" to include "placement of overburden, slurry, or tailings or similar mining-related materials," 67 Fed. Reg. at 31,135, which, they assert, is what will be discharged by the proposed mine. They again fail to place this change in context and thus misunderstand its applicability.

In the original notice in 2000, the agencies cited *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D.W. Va. 1999), as a case that misunderstood the fill rule. The court in that case questioned the parties' agreement that the placement of coal mining overburden into waters of the United States must be permitted under section 404. Pointing to the primary purpose language

of the Corps' regulation, it suggested that the Corps lacked regulatory authority over the proposed discharge because the "primary purpose [was] waste disposal." *Id.* at 658.

The 2000 notice sought to clarify the issue presented in *Bragg*:

> With regard to proposed discharges of coal mining overburden, we believe that the placement of such material into waters of the U.S. has the effect of fill and therefore, should be regulated under CWA section 404. . . . In Appalachia in particular, such discharges typically result in the placement of rock and other material in the heads of valleys, with a sedimentation pond located downstream of this "valley fill." This has required authorization under CWA section 404 for the discharges of fill material into waters of the U.S., including the overburden and coal refuse, as well as the berms, or dams, associated with the sedimentation ponds. The effect of these discharges is to replace portions of a water body with dry land. Therefore, today's proposal makes clear that such material is to be regulated under CWA section 404.

65 Fed. Reg. at 21,295. The agencies emphasized, however, that this change was a narrow clarification and it was not intended to alter what was to be permitted under section 402: "[T]oday's proposal recognizes that discharges from coal mining activities that are covered by a proposed or final EPA effluent

guideline (*See, e.g.*, 40 CFR part 434) are not fill material and would remain subject to regulation under CWA section 402." *Id.* at 21,296.

When the agencies broadened the fill language in the final rule to include more than just "coal mining overburden," they did so because "[t]he general intent of this rule is to cover materials that have the effect of fill, not simply to focus on any one industrial activity." 67 Fed. Reg. at 31,135. In other words, the agencies revised the definition to include wastes from all mining operations, not just coal mining operations, when those wastes have the same effect as coal mining overburden in valley fills. Nothing in this change altered the basic requirement that mining activities covered by an effluent guideline required a permit under section 402.

Indeed, consistent with this longstanding division of work under the Clean Water Act, in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh,* the Fourth Circuit upheld the Corps' determination that section 404 permits, not 402 permits, are required for valley fills in connection with mountaintop coal mining. 317 F.3d 425 (4th Cir. 2003). Notably, the pollutants in question were *not* subject to effluent limitations or NSPS promulgated by the EPA under sections 301, 306, or 307. *See id.* at 445. In fact, the Court pointed out that "Section 402 confers on the EPA responsibility to regulate the discharge of pollutants into waters under mechanisms to administer effluent limitations," *id.* at 448, and specifically upheld the determination that the valley fill activity

was to be regulated under section 404 because the Corps was not attempting to issue a permit for an "effluent that could be regulated by ongoing effluent limitations as described in § 402," *id.*

Like valley fills, the division of permitting responsibility with respect to gold mining using froth-flotation extraction has been clear for many years. In 1994, the EPA issued a guidance document on gold mining that explained:

> The national technology-based effluent guideline limitations have been established for discharges from most active gold mines under the Ore Mining and Dressing Point-Source. These regulations address point source discharges from all types of gold extraction techniques, including open-pit, underground, froth-flotation, heap, *in situ*, and tank cyanide leaching.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL RESOURCE DOCUMENT EXTRACTION AND BENEFICIATION OF ORES AND MINERALS: GOLD, Vol. 2 1-59 (Aug. 1994) (citation omitted), *available at* http://www.epa.gov/osw/nonhaz/industrial/special/mining/techdocs/gold/goldch1.pdf. It further explained that gold mines with discharges into navigable waters must be permitted under section 402, which in turn must comply with these standards. *See id.* at 1-59 to1-61.

The 2002 definition of fill, issued when Mr. Mehan oversaw the EPA's CWA programs, was never intended to and, as a matter of law, cannot upset the

requirements of the Clean Water Act. Because Coeur Alaska's proposed discharge is subject to the NSPS found in 40 C.F.R. § 440.104(b)(1), it must be permitted under section 402.

C. Petitioners' Statutory Claims Misunderstand the Relationship Between Sections 402 and 404

Petitioner Coeur Alaska argues that section 404 applies to its proposed discharges into Lower Slate Lake because they claim that section is a more specific provision that overrides the general requirement of section 402. Petr. Coeur Alaska at 27-29. This misunderstands the Clean Water Act on multiple fronts.

First, it is not clear that section 404 is the "more specific" of these two provisions. It is true that "fill" material is one of many pollutants subject to the discharge ban in section 301(a), and in that sense section 404 applies to a narrower scope of pollutants than does section 402. Section 402 permits, however, implement the more specific treatment obligations promulgated by the EPA pursuant to sections 301(b), 306 and 307. As a result, they effectuate far more specific control obligations than the generalized rules for selecting disposal sites under section 404(b).

Second, Congress adopted section 404 as a very limited exception to the broader permitting authority of section 402. Section 404 was never intended to supplant section 402 as the predominant means of

implementing categorical industrial effluent limitations.

Third, it is inappropriate to apply the canon of statutory construction that specific provisions govern general ones where doing so fails to give effect to key operative statutory provisions, and to the statute as a whole. In *Industrial Union Dept., AFL-CIO v. American Petroleum Institute,* this Court rejected an argument that the more specific provision regarding toxic materials in section 6(b)(5) of the Occupational Safety and Health Act of 1970 overrides the more general definition of occupational safety and health standard in section 3(8) of that statute, and construed the statute in a way that gave effect to both provisions. 448 U.S. 607, 639-40 (1980). Here, section 306(e) of the CWA can be given its full intended effect only if the Kensington Mine is required to get a permit under section 402 rather than 404.

Finally, allowing this result will provide extremely perverse incentives for dischargers, or at least, would reward those dischargers within an industrial category who have the highest volume and highest impact discharges. Under the decision at issue here, discharges with enough mass of suspended solids to significantly change the bottom contour of a water body can receive a section 404 permit to discharge those wastes with no treatment whatsoever. In contrast, a discharger of the same industrial wastes, within the same industrial category defined by the EPA, but whose wastes are lower in volume or lower in concentrations of suspended

solids, receive a section 402 permit and are subject to a strict zero discharge requirement. In other words, discharges that create the most environmental harm receive the least stringent controls. Congress cannot possibly have intended such a bizarre result.

II. DISCHARGE REQUIREMENTS ESTABLISHED BY REGULATION CANNOT BE MODIFIED IN PERMITS

A. This Court Rejected a Similar, But Less Extreme, Argument in *E. I. du Pont de Nemours & Co. v. Train*

Petitioners seek to re-litigate a contention that their counterparts lost over three decades ago in *E. I. du Pont de Nemours & Co. v. Train*, although in a different procedural context. In *du Pont*, chemical manufacturers argued that regulations adopted by the EPA under sections 301, 304 and 306 merely constituted "guidelines" for permit writers, and that enforceable effluent limitations could only be established through section 402 permits. *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 124 (1977). This Court ruled unanimously that Congress directed the EPA to adopt uniform effluent limitations and NSPS in regulations that apply to all sources within a defined category, unless subject to an applicable statutory or regulatory variance. *Id.* at 126-39.

If the Court were to allow the Corps to exempt individual dischargers from mandatory NSPS through the shell game of a section 404 permit rather

than a section 402 permit, that decision would overrule *du Pont*, at least with respect to new sources whose discharges might qualify as "fill material." In fact, because Petitioners' argument here is more extreme than that rejected by this Court in *du Pont*, it should be rejected *a fortiori*.

First, the section 404 permit issued by the Secretary contains *no treatment requirements whatsoever*. JA 360a-361a (tailings will be deposited in Lower Slate Lake with no prior treatment). In *du Pont*, the petitioners implicitly conceded that dischargers of industrial wastes are subject to effluent limitations of *some kind*. *See* 430 U.S. at 130-133. They argued, however, that those requirements could be tailored to individual sources through NPDES permits. *Id.* This Court rejected that claim, because Congress mandated uniformity in technology-based controls and because Congress and the EPA adopted narrowly-tailored variance provisions by statute and regulation as the exclusive relief valve from that uniformity. *Id.* at 129-32; *see also Am. Iron and Steel Inst. v. EPA*, 568 F.2d 284, 307-08 (3d Cir. 1977) (rejecting EPA effort to exempt individual sources by regulation, rather than through approved statutory variance provisions). It is difficult to explain why Congress would allow the Secretary to exempt industrial waste dischargers through section 404 when Congress – and this Court – rejected narrower relief through the carefully-constructed system of regulations, variances, and permits established in sections 301, 306, and 402. Moreover, under section 101(d), such a

result requires express language not present in section 404.

Second, petitioners in *du Pont* sought relief only from the effluent limitations applicable to existing sources. Petitioners here seek an exemption from the stricter NSPS, despite Congress' clear understanding that new sources can design and implement pollution controls free from the constraints of existing infrastructure that may impede similar controls at existing sources. *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 263 (5th Cir. 1989), *clarified on reh'g*, 885 F.2d 253 (1989). Again, it is difficult to believe that Congress intended a more radical exemption from NSPS through a section 404 permit than it – and this Court – allowed for existing sources through a section 402 permit.

Third, Petitioner Coeur Alaska relies on the "permit shield" provision in section 404, just as the petitioners in *du Pont* relied on the analogous provision in section 402(k). *See* Petr. Coeur Alaska Br. at 28-29. In *du Pont*, however, this Court dismissed that argument in a footnote:

> Petitioners attach some significance to the fact that compliance with a § 402 permit is "deemed compliance . . . with sectio[n] . . . 306. . . ." § 402(k). This provision plainly cannot allow deviations from § 306 standards in issuing the permit. For, after standards of performance are promulgated, the permit can only be issued "upon condition that such discharge will meet . . . all applicable

> requirements under sectio[n] . . . 306. . . ." § 402(a)(1); and one of the requirements of § 306 is that no new source may operate in violation of any standard of performance. § 306(e). The purpose of § 402(k) seems to be to insulate various permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question of whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality.

430 U.S. at 138 n.28. Once more, it is difficult to see how the shield provision of section 404, which does not even purport to address compliance with section 306, might exempt a discharger from the mandatory NSPS standards when this Court declined to give such effect to section 402(k).

B. Allowing the Secretary to Confer Unbridled Exemptions Through Section 404 Would Render Congress' Carefully-Defined Statutory Variances Superfluous

Congress adopted specific, narrowly-prescribed variances from the categorical technology-based treatment standards promulgated by the EPA. Notably, *none of those variances apply to new sources.* Where Congress includes precise exceptions that apply under only constrained circumstances, courts should not create – or allow agencies to create – a much broader exception by implication. *See United*

States v. Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

In section 301(c), Congress allowed the Administrator to modify BAT limitations for individual sources, but only "upon a showing . . . that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. § 1311(c). In holding that the EPA properly declined to provide a similar variance from BPT effluent limitations, this Court explained that the narrowly limited purpose of section 301(c) was to provide relief from the stricter second round BAT limits where a discharger met at least the first round of BPT limits, and where the variance requires "the same sort of . . . commitment as the general BAT standard creates for the class." *Nat'l Crushed Stone Ass'n*, 449 U.S. at 73-74. Even where this variance applies, it requires the best available technology within the economic capability of that source, and "reasonable further progress" toward the statutory goal of eliminating discharges. *Id.* As explained by the D.C. Circuit:

> Although this formulation ensures a meaningful variance, it should be noted that it is not a license for avoidance of the Act's strict

> pollution control requirements. It simply allows individual operators to argue, that, given the overall impact of an effluent limitation on their operations, they are faced with *stricter* requirements than the Act authorizes EPA to place on the industry as a whole.

Weyerhaeuser Co., 590 F.2d at 1035 (emphasis in original); *see also Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 120 (D.C. Cir. 1976).

By contrast, Petitioners suggest that Congress created – by sheer negative implication – a much broader exemption from the stricter NSPS, without any showing that the discharger cannot afford to implement the standards or is unfairly burdened when compared to others in its category. This is so, claim Petitioners, even though Congress did not include a variance for new sources in section 306. As noted in *du Pont*: "In striking contrast to § 301(c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.' S. Rep. No. 92-414, p.58 (1971), Leg. Hist. 1476." 430 U.S. at 138.

Similarly, Congress enacted a limited variance from the pollution control requirements imposed on existing dischargers of nonconventional pollutants, but only when dischargers adopt treatment at least sufficient to meet BPT requirements and applicable water quality-based effluent limitations. 33 U.S.C.

§ 1311(g). Again, this variance is not available to new sources. *See Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 192-93 (2d Cir. 2004). Yet Petitioners seek a far broader exemption without any of the constraints in section 301(g).

Finally, in *du Pont* this Court approved presumptively uniform national effluent guidelines in part because the EPA adopted, by regulation, "fundamentally different factors" (FDF) variances whereby individual sources could demonstrate that their pollution control capabilities were limited by differences directly relevant to the EPA's rationale for issuing the national limitations. In 1985, this Court upheld the EPA's use of FDF variances for discharges of toxic pollutants from existing sources, while noting that those variances were not available for new sources. *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 122 n.8 (1985). Congress codified the EPA's FDF variances, but only for limited circumstances. *See* 33 U.S.C. § 1311(n) (2002).

The fact that Congress adopted narrowly-constrained variances for existing sources, and that it expressly foreclosed each of those variances for new sources, shows that it could not possibly have intended dischargers to obtain broader, wholesale exemptions from NSPS simply by obtaining a permit under section 404 rather than section 402.

III. EXEMPTING THE PROPOSED DISCHARGES FROM NSPS VIOLATES FUNDAMENTAL STATUTORY GOALS

A. Allowing This Discharger to Evade the NSPS Would Contravene the Zero Discharge Goal

As a principal means of attaining the statutory objective, Congress directed the EPA to adopt increasingly stringent technology-based limits on point sources, and articulated a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1).

Congress backed up this statutory goal with precise directions that the EPA, through its effluent limitations and NSPS, prohibit discharges of pollutants wherever possible. For the NSPS applicable here, Congress mandated "application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting *no discharge of pollutants*." *Id.* § 1316(a)(1) (emphasis added).

Here, the EPA promulgated zero discharge limitations for new gold mines using a froth-floatation process, finding that it was technologically and economically feasible to dispose of wastes from this process in upland areas. Congress mandated that such prohibitions be imposed on all facilities within the category, and the statute contains "no provision for exceptions from the standards for individual

plants; on the contrary, [it] makes it unlawful to operate a new source in violation of the applicable standard of performance after the effective date." *du Pont*, 430 U.S. at 121; *see also Chem. Mfrs. Ass'n*, 470 U.S. at 122 n.8 (noting that fundamentally different factors variances are not available for new sources). Accordingly, there is no justification for allowing Coeur Alaska to evade the NSPS requirements.

B. The Exemption Granted Here Defeats the Uniformity Mandated by Congress, and Unfairly Favors Some Sources Over Others

To ensure that similarly-situated dischargers are treated fairly, and to prevent states from competing for jobs at the expense of national pollution reduction goals, Congress directed that effluent limitations and NSPS be uniform within industry categories, subject to the limited variance provisions discussed above. *See du Pont*, 430 U.S. at 121, 126-30; *Chem. Mfrs. Ass'n*, 470 U.S. at 119.

This Court has repeatedly highlighted Congress' requirement that treatment standards within industry categories be implemented as uniformly as possible. *See du Pont*, 430 U.S. at 129-30 (discussing existing sources and quoting extensively from explanations by Senator Muskie, principal Senate author and sponsor of the 1972 amendments), 138 (new sources); *Nat'l Crushed Stone Ass'n*, 449 U.S. at 77-78 (discussing uniform BPT limitations); *Chem. Mfrs.*

Ass'n, 470 U.S. at 119, 130 (requirement for EPA to establish "uniform discharge limitations for . . . classes and categories" of dischargers; and noting that "Congress did intend uniformity among sources in the same category, demanding that 'similar point sources with similar characteristics . . . meet similar effluent limitations.'"). The D.C. Circuit explained the reasons for this policy in *Weyerhaeuser Co. v. Costle*: "Congress considered uniformity vital to free the states from the temptation of relaxing local limitations in order to woo or keep industrial facilities. In addition, national uniformity made pollution clean-up possible without engaging in the divisive task of favoring some regions of the country over others." 590 F.2d at 1042.

Allowing treatment obligations to vary according to the permitting provision used would flout this statutory goal of uniformity in application of the Act's technology-based treatment requirements. There is no evidence in the text of section 404 that Congress intended that provision to be used in a way that is so manifestly contrary to the goal of uniform treatment obligations established in the rest of the statute.

C. Allowing Untreated Discharges to Destroy a Pristine Lake Makes a Mockery of the Statutory Objective to Restore and Maintain the Integrity of the Nation's Waters

The fundamental objective of the CWA is to "restore and maintain the chemical, physical, and

biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). *See, e.g., PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994); *Arkansas v. Oklahoma*, 503 U.S. at 101, 105-06; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). According to the 1972 Senate Report:

> Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine water body be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original.

S. Rep. No. 92-414, at 76 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742; *see also* H.R. Rep. No. 92-911, at 76-77 (1972) (Conf. Rep.).

Here, the proposed discharges would kill every fish in a pristine Alaskan Lake, and eliminate the natural processes and functions of an ecosystem for over a decade. It is difficult to fathom a result so diametrically opposed to the fundamental objective of the CWA. Respondents assert that they would restore the lake and restock fish in some ten to fifteen years, after mining operations cease. Even assuming that such restoration is possible, the restoration proposed here is inconsistent with Congressional intent that any environmental changes from discharges should be restored through natural processes, not dubious artificial restoration, and that natural processes

should be restored within "a few hours, days, or weeks," not decades.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 07-984 & 07-990

IN THE
Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

INTEREST OF *AMICI CURIAE*. 1

BACKGROUND. 3

SUMMARY OF ARGUMENT. 8

ARGUMENT. 10

I. The Clean Water Act Vests EPA With Exclusive Authority To Issue Permits Authorizing The Discharge of Industrial Wastes. 10

A. *The Act's Text.* 11

B. *The Act's History and Purpose Support Amici's Reading.* 17

II. The Corps' Permit Is At Odds With Settled Administrative Interpretation Of The Clean Water Act. 22

A. *The Corps' Authority Under Section 404 Does Not Extend to Issuing Permits For the Discharge of Mining Wastes as "Fill Material".* 22

B. *The Corps' Permit is Contrary to Settled Understanding of the Meaning Of the Term "Fill Material".* 27

CONCLUSION. 31

TABLE OF AUTHORITIES

Cases: **Pages**

Agerton v. City of Lake Charles,
273 So.2d 353 (La. Ct. App. 1973).... 29
Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007 (9th Cir. 2002) 11
Dolan v. United States,
546 U.S. 481 (2006).... 11
E.I. du Pont de Nemours & Co. v. Train,
430 U.S. 112 (1977).... 15, 24
Garcia v. United States,
469 U.S. 70 (1984).... 14
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Insur. Co., 463 U.S. 29 (1983).... 26, 27
Natural Res. Def. Council, Inc. v. Costle,
568 F.2d 1369 (D.C. Cir. 1977) 11
NLRB v. Amax Coal Co.,
453 U.S. 322 (1981) 27, 29
Rapanos v. United States,
547 U.S. 715 (2006).... 13
Reiter v. Sonotone,
442 U.S. 330 (1979).... 14
Reserve Mining Co. v. EPA,
514 F. 2d 492 (8th Cir. 1975).... 9, 18, 19
Rheault v. Tennefos Constr. Co., Inc.,
189 N.W.2d 626 (N.D. 1971).... 29
S.D. Warren v. Me. Bd. of Envtl. Prot.,
547 U.S. 370 (2006) 14
Traigle v. Lafayette Airport Comm'n,
309 So.2d 904 (La. Ct. App. 1975).... 29
United States v. Gonzales,
520 U.S. 1 (1997).... 14
United States v. Homestake Mining Co.,
595 F.2d 421 (8th Cir. 1979).... 20

United States v. Iron Mountain Mines, Inc.,
812 F. Supp. 1528 (E.D. Cal. 1992). 20
United States v. James,
478 U.S. 597 (1986). 14
United States v. Wells,
519 U.S. 482 (1997). 27
V.C. Edwards Contracting Co., Inc. v. Port of Tacoma, 503 P.2d 1133 (Wash. Ct. App. 1972). 29
Winkelman v. Parma City Sch. Dist.,
127 S. Ct. 1994 (2007). 11

Statutes:

33 U.S.C. § 403. 18
33 U.S.C. § 407. 18
33 U.S.C. § 1251(a). 8, 11
33 U.S.C. § 1311. . . . . 11, 18
33 U.S.C. § 1311(a). 13
33 U.S.C. § 1311(c). 21
33 U.S.C. § 1316. . . . . 11, 18
33 U.S.C. § 1316(e). 15
33 U.S.C. § 1342. . . . . 8, 9, 11, 18
33 U.S.C. § 1342(a)(5). 19
33 U.S.C. § 1342(*l*)(2). 13
33 U.S.C. § 1342(p)(3). 12
33 U.S.C. § 1344. . . . . 3, 9, 10, 16
33 U.S.C. § 1344(a). 27
33 U.S.C. § 1344(c). 22
33 U.S.C. § 1344(f). 3
33 U.S.C. § 1344(f)(1). 16, 22
33 U.S.C. § 1344(f)(2). 16, 17

Falmouth, Me., Code ch. 601 § 5.34 (2003). 28

Regulatory Materials:

40 Fed. Reg. 31,320 (July 25, 1975). 6

42 Fed. Reg. 37,122 (July 19, 1977). 6, 23, 24
47 Fed. Reg. 25,682 (June 14, 1982). 4
47 Fed. Reg. 54,598 (Dec. 3, 1982). 4
51 Fed. Reg. 8,871 (Mar. 14, 1986). 24, 26
53 Fed. Reg. 20,764 (June 6, 1988). 24
65 Fed. Reg. 21,292 (Apr. 20, 2000). 25
67 Fed. Reg. 31,129 (May 9, 2002). 6, 24, 25
33 C.F.R. § 209.120(d)(6) (1976). 23
33 C.F.R. § 209.120(d)(7) (1976). 23
33 C.F.R. § 323.2(m) (1977). 23
33 C.F.R. § 323.2(e) (2001). 23
33 C.F.R. § 323.2(e)(3) (2002). 26
40 C.F.R. § 440.104(b)(1). 4, 26
40 C.F.R. Parts 405, 406, 411, 425 & 429. 30

Legislative Materials:

A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Jan. 1973). 12, 15, 18, 20, 21

Miscellaneous:

American Society of Civil Engineers, Definitions of Surveying and Associated Terms (1972). 28
Bruner & O'Connor Construction Law. 29
EPA, Terms of Environment (2007). 28
Oxford English Dictionary (2nd ed. 1989). 28

INTERESTS OF AMICI CURIAE[1]

The question in this case is whether the issuance of a permit by the U.S. Army Corps of Engineers ("Army Corps" or "Corps") authorizing petitioner Coeur Alaska, Inc., to discharge millions of gallons of wastewater containing tailings from its gold mine into a pristine lake that is a navigable water of the United States violates the Clean Water Act ("the Act"). The Ninth Circuit answered that question in the affirmative.

This brief in support of respondents is filed on behalf of the following Members of Congress: Frank Pallone, Jr., Pete Stark, Maurice Hinchey, Donald Payne, Raul Grijalva, Jan Schakowsky, Rosa DeLauro, Rush Holt, Mike Honda, Dennis Kucinich and Earl Blumenauer. *Amici* are Members of a number of Committees that have jurisdiction over environmental matters, including the Natural Resources Committee, the Energy and Commerce Committee, the Education and Labor Committee, the Ways and Means Committee, and the Appropriations Committee. *Amici* have a strong interest in ensuring the Act is properly implemented. Each *amicus* represents a district containing navigable waterways potentially affected by

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to its preparation or submission. No person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission. This brief is filed with the written consent of the parties, which is on file with the Clerk of the Court.

the outcome of this case.

At bottom, this case presents a question of congressional intent — namely, whether Congress gave the Army Corps the authority to issue a permit allowing the discharge of industrial pollutants into navigable waters that the Act otherwise forbids. *Amici* are uniquely situated to address this question. Although *amici* submit this brief in their individual capacities, not on behalf of Congress, their views are informed by their considerable experience as Members of Congress.

In *amici's* view, the Ninth Circuit correctly ruled that the permit issued by the Army Corps violated the Act. The Act mandates uniform compliance with discharge standards for industrial wastes established by the Environmental Protection Agency ("EPA"). The Corps' limited authority to issue permits for construction and navigation projects in no way supplants EPA's exclusive authority over waste disposal. Indeed, the position advocated by petitioners disregards the Act's clear text, invites an end-run around EPA's sole authority to authorize the discharge of wastewater, and gives mining companies incentives to dump their wastes into rivers and lakes and not on land. Adopting petitioners' approach would promote large-scale dumping of industrial wastes into the waters of the United States — exactly the dumping the Act was designed to end.

BACKGROUND

1. The permit in question in this case was issued by the Army Corps to grant Coeur Alaska, Inc., permission to discharge contaminated waste, known as process wastewater, directly into waters of the United States. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 640 (9th Cir. 2007) ("*SEACC*"). Section 402 of the Act gives EPA exclusive authority to issue permits for the discharge of industrial pollutants. 33 U.S.C. § 1342. Section 404 of the Act provides a limited exception to EPA's otherwise exclusive permitting authority by granting to the Army Corps the power to issue "dredge and fill" permits for the placement of "fill material" into waters of the United States — that is, when it is necessary to use "fill" to construct bridges, dams, piers, or other infrastructure, or to alter water flow to facilitate navigation. 33 U.S.C. §§ 1344, 1344(f). Nothing in Section 404 authorizes the Army Corps to issue permits for the discharge of industrial pollutants or, for that matter, waste products of any kind.

To ensure that no discharge of industrial wastes regulated by the Act deviates from EPA standards, Sections 301 and 306 of the Act subject *all* discharges to uniform discharge standards set and administered by EPA. And EPA has, in fact, set a zero discharge standard for precisely the kind of gold-mine waste Coeur Alaska seeks to discharge. In 1982, EPA conducted a survey of waste disposal methods in use at gold mines across the nation and concluded that waste disposal techniques resulting in zero discharge into waters of the United States were routinely and cost-

effectively employed. 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982); 47 Fed. Reg. 25,682, 25,692 (June 14, 1982). For this reason, EPA established a "zero discharge" standard for gold mines that use the froth-flotation process to separate valuable ore from waste, as would Coeur Alaska's mine. *See* 40 C.F.R. § 440.104(b)(1). There is no question that, had Coeur Alaska sought a permit from EPA, the application would have been denied under EPA's twenty-six-year-old zero discharge rule.[2]

2. Coeur Alaska instead sought a permit from the Army Corps under Section 404 of the Act, which authorizes the Corps to issue "dredge and fill" permits, to allow its Kensington Mine to discharge heavily polluted wastewater into Lower Slate Lake. *See SEACC*, 486 F.3d at 640. Coeur Alaska plans to extract gold from the Kensington Mine and then separate it from waste rock using a process known as froth-flotation. *Id.* at 641. Coeur Alaska will remove rock from the mine, grind it into fine gravel, and pump it (along with various chemicals) into large water tanks where the froth-flotation process occurs. *Id.* The addition of chemicals causes bubbles to form around the gold-bearing ore and float to the top of the tank, where the ore is skimmed off. *Id.* Some of the remaining material — known as tailings — can be re-deposited in the mine. But a significant amount (as

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[2] This standard effectively requires Coeur Alaska to dispose of waste products from its froth-flotation mill either on land or in protected impoundments such as artificial ponds lined with impermeable membranes. *SEACC*, 486 F.3d at 641.

much as 4.5 million tons in this instance) must be discarded elsewhere. *Id.*

In 1997, Coeur Alaska sought and was granted a permit to build a dry tailings facility on land near the mine, which would not have involved the discharge of wastewater. *Id.* at 641-42. Rather than spend money to build the facility, Coeur Alaska instead proposed in 2001 to dam nearby Lower Slate Lake and use the lake as a dump site for the tailings-laden wastewater, which would be discharged into the lake in the form of a semi-liquid "slurry." This discharge would raise the bottom of the lake by approximately fifty feet and cause the lake's surface area to triple in size. *Id.* The wastewater contains a number of toxic substances, including aluminum, chromium, copper, lead and mercury, which would cause substantial environmental damage to this pristine lake and adjacent wetlands. *Id.* at 642; *see also* Respondents' Br. at 4. Coeur Alaska applied for, and received, a permit from the Corps under Section 404 of the Act. This is the first time the Corps has issued a permit allowing a gold mine operator to discharge process wastewater into waters of the United States.

The Corps' issuance of this permit was a departure from the Corps' longstanding interpretation of its authority under Section 404. Until 2002, the Corps took the position that its permitting authority over "fill" was limited to fill used for construction or navigation. In 1975, the Army Corps defined "fill material" to mean material used to replace an aquatic area with dry land or to raise the elevation of a water body. 40 Fed. Reg. 31,320, 31,325 (July 25, 1975). In

1977, the Corps clarified that "fill material" is material used for the "primary purpose" of construction or for navigational safety. *See* 42 Fed. Reg. 37,122, 37,145 (July 19, 1977). In contrast, if material was placed in a water body "primarily to dispose of waste," the waste was not fill material and thus EPA, not the Corps, had jurisdiction under Section 402. *Id.*

In 2002, the Army Corps redefined "fill material" to embrace anything at all that, when dumped in a water body, raises the elevation, and abandoned the "primary purpose" test for waste. 67 Fed. Reg. 31,129 (May 9, 2002). Because industrial wastes sink to the bottom of a water body and raise its elevation, the Corps' expanded definition of "fill" threatened to arrogate authority the Act assigns to EPA. To avoid dispute over their respective jurisdiction, the Army Corps, together with EPA, appended to the new definition a statement clarifying that neither agency's authority would change as a result of the rule-making. *Id.* at 31,130; *see also id.* at 31,135.

In 2005, however, the Army Corps did an about-face and issued a "dredge and fill" permit to Coeur Alaska. The permit authorizes the discharge of 210,000 gallons of wastewater daily into the Lower Slate Lake; a discharge that cannot be reconciled with EPA's zero discharge standard. If the discharge is allowed to proceed, it will result in millions of gallons of wastewater contaminated with chemicals and containing 4.5 million tons of suspended solids such as pulverized lead and mercury being flooded into a pristine lake surrounded by wetlands in the Tongass National Forest. *SEACC*, 486 F.3d at 642. The lake

would be rendered a "dead lake," unable to sustain life and unsuitable for human use, and the pollution would spread to nearby wetlands, causing untold environmental harm. *Id.*

3. Three conservation organizations, Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation, challenged the Corps' decision in United States District Court for the District of Alaska. These groups contended that Coeur Alaska's actions were governed by the National Pollution Discharge Elimination System (NPDES) permitting program set up under Section 402 of the Act, and in particular by the 1982 EPA regulation prohibiting the "discharge of process wastewater to navigable waters from mills that use the froth-flotation process." Coeur Alaska and the State of Alaska intervened on behalf of the Corps and filed a motion for summary judgment, which the district court granted. *Id.* at 643.

The Ninth Circuit reversed. In finding the Corps' permit invalid, the court relied on the text of Sections 301 and 306 of the Act, which make unlawful *any* discharge that does not comply with applicable effluent and performance standards. *Id.* at 646-48. In so holding, the court rejected Coeur Alaska's argument that Congress had created an implied exemption for permits sought under Section 404. Instead, the court found that Congress intended the existence of a discharge standard or limitation implemented through Section 402 to preclude the issuance of a Section 404 permit. *Id.* at 647-48.

The court also noted that when the two permitting agencies — EPA and the Corps — promulgated a joint regulation regarding fill material in 2002, both the regulation and their joint statements emphasized the continuing applicability of previous discharge standards and permitting practices. *Id.* at 651-53. Because EPA promulgated a standard for process wastewater of the type the Kensington mine will produce well prior to 2002, the court concluded that the Corps' issuance of a permit to Coeur Alaska was at odds with the agencies' position that the Corps lacked authority to issue a permit under Section 404 where, as here, a discharge standard is in force. *Id.* at 653.

SUMMARY OF ARGUMENT

Amici join in respondents' more comprehensive treatment of the issues in this case. *Amici* file this brief to highlight two points:

First, the Clean Water Act refutes petitioners' claims. The Act prohibits the Army Corps from issuing permits that authorize the discharge of process wastewater into our nation's navigable waters. Indeed, the Act was passed for the very purpose of maintaining and improving the quality of the nation's waters by reducing pollution. 33 U.S.C. § 1251(a). The Act does so by directing EPA to control the disposal of waste into waters of the United States. *Id.* § 1342. At the same time, the Act withdrew the expansive authority previously exercised by the Army Corps under the Refuse Act, confining the Army Corps to discrete power to issue "dredge and fill" permits to enable construction

of infrastructure projects like jetties and piers, so long as they do not obstruct navigation. *See id.* § 1344. Congress reposed authority only in EPA — not the Army Corps — to license waste disposal in waters of the United States. *Id.* § 1342.

This reading of the Act is confirmed by the Act's history. One event leading to the enactment of the Act was the wholesale discharge of mining wastes into the Great Lakes. The Act was passed to eliminate dumping of industrial waste into our nation's rivers and lakes, and, in the interim, to ensure that no dumping takes place without EPA's approval. *See generally Reserve Mining Co. v. EPA*, 514 F. 2d 492 (8th Cir. 1975). *Amici's* reading of the Act is also confirmed by EPA's interpretation of the Act as forbidding the "discharge of process wastewater to navigable waters from mills that use the froth-flotation process."

Second, petitioners' argument should be rejected because it flies in the face of longstanding, consistent administrative interpretation by both EPA and the Army Corps, which holds that only EPA, and not the Corps, may authorize discharges subject to an effluent standard issued by EPA.

Petitioners' argument is further flawed because it seeks to expand the term "fill material" far beyond its established meaning. Petitioners claim that mine waste contains materials similar to fill, and therefore the Army Corps properly issued Coeur Alaska a permit under Section 404 of the Act. 33 U.S.C. § 1344. But this argument collides with the unavoidable fact that

the word "fill" is a term of art: It refers to material used to fill a space to facilitate construction. By no stretch is "fill" a synonym for "waste" or "any collection of solid materials," as petitioners claim. Indeed, petitioners' argument has no limiting principle. If their reading of the statute were correct, a company could get a Corps permit to dump any pollutant into navigable waters of the United States by calling it "fill," so long as it would raise water levels, even if the waste's discharge was otherwise forbidden by EPA, and even if the discharge was only for waste disposal.

The Army Corps' unprincipled departure from these settled administrative interpretations threatens to destabilize a statutory and regulatory regime that, by and large, has operated as Congress directed in the Act. The Ninth Circuit was right to invoke principles of regulatory consistency in vacating the permit the Corps issued to Coeur Alaska.

ARGUMENT

I. The Clean Water Act Vests EPA With Exclusive Authority To Issue Permits Authorizing The Discharge Of Industrial Wastes.

The question in this case is whether the Clean Water Act authorizes the Army Corps to issue a discharge permit to Coeur Alaska allowing contaminated wastes to be dumped into waters of the United States. Answering that question "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any

precedents or authorities that inform the analysis." *Dolan v. United States*, 546 U.S. 481, 486 (2006). *See also Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000 (2007). The text, purpose, history, and longstanding administrative interpretation of the Act all point in the same direction: Only EPA may issue a permit authorizing the discharge of waste into the navigable waters of the United States.

A. The Act's Text.

The Act's core goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by "elimin[ating]" the "discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a). To accomplish this goal, Sections 301 and 306 of the Act require EPA to establish pollution control standards that must be imposed on all industrial and municipal discharges pursuant to the NPDES permitting program under Section 402. 33 U.S.C. §§ 1311, 1316, 1342. *See also, e.g., Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002) (stating that the imposition of standards via the Section 402 permit program is the "cornerstone" of the Act); *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977) (stating that Section 402 permitting is "central to the enforcement" of the Act).[3]

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[3] The Clean Water Act received broad backing as a much-needed pollution control measure. The 92nd Congress conducted a major review of existing water pollution laws

(continued...)

Section 402 of the Act grants EPA exclusive authority to issue permits for the discharge of waste — including industrial waste — into the waters of the United States. According to Section 402, "[p]ermits for discharges associated with *industrial activity* shall meet all applicable provisions of this section." 33 U.S.C. § 1342(p)(3) (emphasis added). There is no question that mining is an "industrial activity," and not an infrastructure project like the construction of a bridge, dam or pier. Therefore, any discharge of mining waste into the waters of the United States must be authorized by a permit issued in accordance with Section 402, or the discharge is unlawful.[4]

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[3](...continued)
and enacted the Federal Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act. The Act passed the Senate unanimously and the House by an overwhelming majority. Senate Report and Debates, *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972* (hereinafter "*ALH*") at 222; House Report and Debates, *ALH* at 277. President Nixon vetoed the bill because of fiscal concerns. *See* Federal Water Pollution Act—Veto Message, Oct. 17, 1972, *ALH* at 137. Congress overrode that veto with landslide votes. *See* House Debate on Overriding the President's Veto of S. 2770, *ALH* at 95-96, 109-13; Senate Debate on Overriding the President's Veto of S. 2770, *ALH* at 135-36.

[4] In contrast, Section 402(*l*)(2), states that NPDES permits *are not* required for mine runoff that *has not* been contaminated with mine waste:

> The Administrator shall not require a permit under
> (continued...)

Section 301 drives home that the Act's pollution control standards are not discretionary and that any permit under Title IV, which embraces Sections 402 and 404, must comply with those standards. Section 301 provides that, "[e]xcept as in compliance with this section *and* sections 1312, 1316, 1317, 1328, 1342, *and* 1344 of this title, the discharge of *any pollutant* by *any person* shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). *See also Rapanos v. United States*, 547 U.S. 715, 723 (2006) (stating that Section 301's prohibition is one of the "principal provisions" of the Act).

Congress's crafting of Section 301 merits close attention. First, Congress used the connector "and" in setting out the general rule that "[e]xcept as in compliance with this section *and* sections . . . of this title," including Sections 306, 402 and 404, the discharge of pollution "shall be unlawful." Congress's

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[4](...continued)
this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations . . . which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

§ 402(*l*)(2). This provision makes sense because permits *are* required under Section 402 for any mine runoff which *has* been contaminated by mine waste. Subsection (*l*) would make no sense under petitioners' reading of the Act.

use of "and" instead of "or" was deliberate. *See, e.g.*, *Garcia v. United States*, 469 U.S. 70, 74 (1984); *Reiter v. Sonotone*, 442 U.S. 330, 338-39 (1979). As the text makes clear, Congress did so to ensure that *every* permit issued under the Act complies with the pollution control requirements of Section 301 *as well as* the separate and additional requirements of the section authorizing the issuance of the permit. *SEACC*, 486 F.3d at 655. *See also S.D. Warren v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 376-78 (2006) (giving text of Clean Water Act everyday meaning).

Second, and of equal significance, Congress's repeated use of the word *any* underscores Section 301's breadth. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997); *United States v. James*, 478 U.S. 597, 604 (1986). The Section was plainly written to ensure that "the discharge of *any pollutant* by *any person*" is unlawful, unless the person has obtained a permit that complies with Section 301. There is no exception to this requirement; the provision's language is categorical.[5]

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[5] This understanding of the Act was widely shared at the time it was being drafted. In comments on the draft legislation, EPA's Administrator observed that "[e]ffluent limitations required by Section 301 would be established and applied to all point sources of discharges covered by the Act by means of the permits issued under Title IV." H.R. Rep. No. 92-911, *reprinted in ALH*, at 844. *See also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) ("It is clear that Congress intended these [Section 301] regulations to be absolute prohibitions.").

Another section reinforces *amici's* reading of the Act. Section 306(e) provides that it "shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e). Again, Congress's repeated use of the word "any" drives home the categorical nature of this prohibition — the provision makes it unlawful for *any* operator of *any* new source to violate *any* applicable performance standard, period. There is no way to square the Corps' issuance of discharge permit to Coeur Alaska with the unambiguous dictate of Section 306(e). There is no dispute that the Kensington mine is a "new source" subject to EPA's zero discharge standard. Nor does the language suggest an exception. Thus, in the language of Section 306(e), a discharge of waterborne mining wastes into waters of the United States would be "in violation" of a "standard of performance applicable to such source."

This reading of the Act is also consistent with, and preserves, the narrow authority the Act confers on the Army Corps to issue permits. Under Section 404, the Army Corps' permitting authority is limited to "dredge and fill" construction and navigation projects; it does not extend to the disposal of industrial wastes. 33 U.S.C. § 1344.

Section 404 of the Act makes this clear in two ways. To begin with, Subsection 404(f)(1) describes operations with "dredge and fill" components *exempted* from regulation. 33 U.S.C. § 1344(f)(1). These operations include: farming; water conservation; maintenance and reconstruction of pre-existing

structures "such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures"; "construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters"; and "construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment," so long as navigable waters are "not impaired" and "any adverse effect on the aquatic environment" is minimized. 33 U.S.C. § 1344(f)(1)(A)-(F). The words "construction" and "navigation" run through these descriptions of exempted dredging and filling activities for a reason — dredging and filling are activities integral or related to construction and infrastructure projects. *See id.*

Next, Subsection 404(f)(2) defines those "dredge and fill activities" that are *not* exempted and therefore may not be undertaken without a permit. Under Subsection (f)(2), a permit is required for the "[1] discharge of dredged or fill material into the navigable waters *incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject*, [2] where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2) (emphasis added). The first clause defines the discrete *scope* of the Army Corps' jurisdiction, encompassing only discharges that are incidental to construction activities requiring deposits into waters — such as the building of bridges or dams — that might have an impact on navigation. *Id.* The second clause sets forth the *purpose* for which a permit may be issued

by the Corps, which is to ensure the safety and non-obstruction of navigable waters. *Id.* Read together, the two subsections of Section 404(f) make evident that the Corps' permitting authority is limited to activities undertaken for purposes relating to "dredge and fill" operations; that is, operations necessary for infrastructure development and navigation in waters of the United States.

The text of the Act resolves this case. The "dredge and fill" permit the Army Corps issued to Coeur Alaska is invalid not just because its issuance exceeded the Corps' authority under Section 404, but also because the permit violates Section 301's "absolute prohibition" on the discharge of waste without a permit properly issued by EPA under Section 402 of the Act, as well as Section 306(e)'s prohibition against discharges by "new sources" in violation of EPA established performance standards.

B. The Act's History and Purpose Support Amici's Reading.

This conclusion is bolstered by a review of the drafting history of the Act. One of Congress's chief concerns was to eliminate the exact kind of discharge Coeur Alaska seeks permission for — that is, the dumping of process wastewater or waterborne solid waste into waters of the United States. At the time the Act was making its way through Congress, several Members of Congress were trying to force the Reserve Mining Company to stop dumping 67,000 tons of taconite tailings daily into Lake Superior. *See, e.g.*, Senate Consideration of the Report of the Conference

Committee, Oct. 4, 1972, *reprinted in ALH* at 190-94 (remarks of Sen. Griffin of Michigan); *see also Reserve Mining Co. v. EPA*, 514 F.2d 492, 530-31 (8th Cir. 1975). Reserve Mining operated a taconite mine in Minnesota's Mesabi Iron Range, but placed its mill (the beneficiation plant) on the shore of Lake Superior. *Id.* at 500. Reserve Mining had been dumping process wastewater into the lake for decades, causing extensive water contamination and threatening the safety of residents who drank the lake water and used the lake for fishing and recreation. *Id.* at 530-31. The Act was designed in part to put an end to that dumping. *See* 33 U.S.C. § 1311, 1316, 1342.

Prior to the passage of the Clean Water Act, the Army Corps was responsible for regulating deposits into waters of the United States, including waste disposal, under the Rivers and Harbors Appropriation Act of 1899. The Corps had issued permits for construction, deposits of fill and other potential obstructions to navigation under Section 10 of that Act (33 U.S.C. § 403), and had recently instituted a permit program for industrial waste discharges under Section 13 (33 U.S.C. § 407), more commonly known as the Refuse Act. The Clean Water Act transferred to EPA responsibility for permitting and standard-setting for waste discharges, leaving the Corps to administer only the construction and navigation-related dredge and fill permitting process.

The impact of this near-total reallocation of authority was evident in the *Reserve Mining* case. Just three years after the Act's passage, the U.S. Court of Appeals for the Eighth Circuit concluded that the

Reserve Mining Company's dumping of process wastewater into Lake Superior, conducted pursuant to a permit issued under 33 U.S.C. § 403 (Section 10 of the Rivers and Harbors Act) authorizing the company to "deposit tailings from the ore processing mill" into the lake, was now subject to the NPDES permit program authorized under Section 402 of the Clean Water Act. *See Reserve Mining*, 514 F.2d at 531. In the court's view, Reserve Mining's most recent application for a Refuse Act permit to discharge process wastewater into Lake Superior, submitted to the Army Corps in 1971 but not acted on, automatically had been converted into an NPDES permit application under Section 402 upon the Clean Water Act's enactment. *See id.* The Eighth Circuit concluded that, while the original permit Reserve Mining had received from the Army Corps in 1960 remained valid with regard to the navigational impacts of Reserve Mining's dumping — the *only* impacts assessed by the Army Corps — that permit was not sufficient to authorize Reserve Mining's ongoing discharge of industrial wastes. *Id.* at 532. At no point did the court even consider that the discharge of process wastewater might be permitted under the Corps' Section 404 dredge and fill authority, undoubtedly because mine waste clearly did not constitute "fill." *Id.*[6]

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[6] The court's treatment of Reserve Mining's permit is consistent with the mandate of 33 U.S.C. § 1342(a)(5). It also accords with Congress's statement that "Section 402 transfers the 1899 Refuse Act permit program from the Corps of Engineers to the Administrator [of EPA]." *ALH* at 321. *See also ALH* at 274 ("Section 402 transfers the

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Until the Corps' issuance of the Coeur Alaska permit, the Act was always understood to vest EPA with sole authority to issue permits for wastewater discharges. This understanding is evident not just in the *Reserve Mining* case, but in others as well. For example, just four years after the Act took effect, the Homestake Mining Company was required to obtain a Section 402 permit subject to pollution control standards under Sections 301 and 306 before it could discharge "waste water containing tailings, heavy metals, and suspended solids" from its South Dakota gold mine into navigable waters. *United States v. Homestake Mining Co.*, 595 F.2d 421, 422-23 (8th Cir. 1979). Also in the 1970s, Iron Mountain Mines, Inc., was required to obtain a Section 402 permit for discharges from a California mine that produced gold and other ores. *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1540 (E.D. Cal. 1992) (addressing liability issues).

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[6](...continued)
[discharge permit program] from the Army Corps to the EPA, and provides a mechanism for the States to assume full jurisdiction."). Indeed, after the Act's passage in 1972, the Army Corps ceded jurisdiction to EPA over all pending applications under the Refuse Act. *See, e.g.*, Highlights of the Bill, Conference Report from House Debate, *ALH* at 362 ("Pending applications under the Refuse Act program would be transferred from the Corps of Engineers who are administering the 1899 Refuse Act to the Environmental Protection Agency who would initially be responsible for the administration of the new program.").

As a final point, petitioners' argument, if accepted, would not only end run the Act's pollution control requirements, but would also defeat the Act's goal of uniform treatment for companies engaged in waste discharge. The National Association of Home Builders ("NAHB") suggests the standards imposed by Sections 301 and 306 are superfluous because the Army Corps conducts an extensive analytical process before issuing a Section 404 permit to ensure that no serious environmental harm will result. But the case-by-case evaluations that NAHB touts and that the Corps conducts cannot supplant EPA-issued standards. Congress drafted the Clean Water Act to require EPA to set industry-wide, science-based effluent standards which take into account the burden a standard would place on an industry. According to the 1972 Conference Report, "The conferees intend that the [EPA] Administrator . . . will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination." *ALH* at 304. Although a permit applicant may seek an exception from an industry-wide standard, the burden is a high one. *See, e.g.*, 33 U.S.C. § 1311(c). The case-by-case environmental review NAHB favors thus is exactly the system that Congress rejected in the Clean Water Act.[7]

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[7] The NAHB's argument also confuses the distinctly different roles served by EPA's standard-setting and the Corps' environmental review. EPA's job is to set uniform, science-based discharge limits for industrial and municipal discharges. The Corps' review, in contrast, focuses on the

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As is evident, the Act's text, purpose, and history demonstrate that only EPA, and not the Corps, may issue permits for the discharge of waste into waters of the United States. Accordingly, the judgment below should be affirmed.

II. The Corps' Permit Is At Odds With Settled Administrative Interpretation Of The Clean Water Act.

Not only did the Corps' issuance of a permit to Coeur Alaska violate the Clean Water Act, it also cannot be squared with longstanding administrative interpretations of the Act on two key points — first, the strict limits on the Corps' "dredge and fill" permitting authority under Section 404 and second, the meaning of the term "fill material." The Corps' unexplained and unprincipled departure from these long settled agency views is yet another reason to affirm the Ninth Circuit's ruling.

A. The Corps' Authority Under Section 404 Does Not Extend to Issuing Permits for the Discharge of Mining Wastes as "Fill Material."

As noted, the Act was passed in 1972. By 1976, the Army Corps had formally adopted definitions for

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[7](...continued)
environmental consequences of dredge and fill operations, which can damage aquatic life and wetlands. *See* 33 U.S.C. §§ 1344(c), (f)(1)(E).

"fill material" and the "discharge of fill material," which acknowledged that the Corps' authority was limited to permits for fill needed for construction and navigation projects. The Corps defined "fill material" as material "used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose," and "[d]ischarge of fill material" as "the addition of fill material into navigable waters for the purpose of creating fastlands, elevations of land beneath navigable waters, or for impoundments of water." 33 C.F.R. §§ 209.120(d)(6), (7) (1976). In 1977, the Army Corps clarified that waste materials were *excluded* from its definition of fill materials. 42 Fed. Reg. at 37,145 (excluding "any pollutant discharged into the water primarily to dispose of waste"). At no point did the Corps suggest that it could issue permits authorizing the discharge of wastewater.

In the ensuing decades, the Army Corps repeatedly reaffirmed its view that "fill material" "does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act." 33 C.F.R. § 323.2(m) (1977); 33 C.F.R. § 323.2(e) (2001). According to the Army Corps' "primary purpose test," if material was placed in a water body for the "primary purpose" of waste disposal, EPA had permitting jurisdiction under Section 402. *See* 42 Fed. Reg. at 37,145. Following that approach, a Memorandum of Agreement ("MOA") between the Army Corps and EPA in 1986 listed mining wastes among those discharges that required permits from EPA under Section 402. 51 Fed. Reg. 8,871, 8,872

(Mar. 14, 1986). The MOA also specified that a discharge "in liquid, semi-liquid, or suspended form" would be permitted by EPA pursuant to Section 402, as well as "a discharge of solid material of a homogeneous nature normally associated with single industry wastes." *Id.* Discharges requiring permits from the Corps under Section 404 included discharges having as their "primary purpose" or "one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation," or discharges resulting "from activities such as road construction or other activities where the material to be discharged is generally identified with construction-type activities." *See id.* at 8,872; *see also* 53 Fed. Reg. 20,764 (June 6, 1988).

To be sure, in 2002 the Army Corps changed course when it adopted a new regulatory definition of "fill material" that included any material the discharge of which has the effect of elevating a water body, regardless of whether the discharge is for construction or navigation. 67 Fed. Reg. at 31,130. The breadth of this new definition, coupled with the Corps' abandonment of its "primary purpose" test, raised questions about whether the Corps was encroaching on the EPA's permitting authority under Section 402.

To avoid jurisdictional conflict, EPA and the Army Corps issued a joint statement that "this final rule will not modify existing regulatory practice." 67 Fed. Reg. at 31,130. The agencies also agreed that not *every* discharge with the effect of elevating water levels could be considered fill material. In the proposed rule, the agencies stated that no discharge subject to an

EPA standard under Section 306 would be considered "fill material." 65 Fed. Reg. 21,292, 21,299 (Apr. 20, 2000). In the final rule, the agencies explained that they had deleted the clause excluding discharges already subject to EPA standards because of concerns raised in public comments that the language was "vague" and "would result in uncertainty." 67 Fed. Reg. at 31,135 ("In light of the concerns and confusion associated with the proposed provision, we have decided to delete it from the rule."). Instead, the agencies specified that the re-definition would not change permitting jurisdiction with regard to discharges containing solids (such as mining waste):

> Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.

Id. The final rule also contains exceptions for trash and sewage, which also would have fit squarely within the new definition of fill material had they not been exempted. *See* 33 C.F.R. § 323.2(e)(3). In short, the 2002 rule-making maintained the *status quo* and reaffirmed both agencies' longstanding recognition that

discharges subject to EPA-established effluent limitations are required to be regulated by EPA under Section 402.

The permit issued by the Corps to Coeur Alaska violates these understandings. As stated above, for over two decades EPA has imposed an industry-wide zero discharge standard on froth-flotation mills such as the one planned by Coeur Alaska, pursuant to the NPDES permit program. *See* 40 C.F.R. § 440.104(b)(1) ("there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores"). In addition, the 1986 MOA committed the Corps to defer to EPA to permit mine waste as well as other waterborne suspended solids, *see* 51 Fed. Reg. at 8872, a commitment the Corps explicitly reaffirmed during its 2002 rule-making.

Therefore, according to the Corps' promise to maintain the regulatory *status quo*, it should have let EPA decide whether to issue a permit for Coeur Alaska's planned discharge of process wastewater under Section 402. It did not. Instead, in 2005, the Army Corps disregarded both the MOA and the statements it made along with EPA and issued a Section 404 permit to Coeur Alaska. Making matters worse, the Corps did not acknowledge, let alone explain, why it changed course. The Army Corps' failure to do so violates the longstanding rule that an administrative agency must acknowledge and provide a reasoned justification when it diverges from past practice or policy. *See, e.g., Motor Vehicle Mfrs. Ass'n*

v. State Farm Mut. Auto. Insur. Co., 463 U.S. 29, 42-43 (1983). The Ninth Circuit was right to invalidate the Corps' permit on this ground as well.

B. The Corps' Permit Is Contrary to Settled Understanding of the Meaning of the Term Fill Material.

The Corps has violated principles of reasoned agency decision-making in yet another way: It has robbed the term "fill material" of any meaning. As explained above, the Corps' permitting authority under the Clean Water Act is limited to permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). In an effort to arrogate authority denied to it by Congress, the Corps has redefined "fill material" to cover virtually any substance that can be dumped into water so long as it raises the water level. But the term "fill material" is a term of art that does not encompass "waste," especially where, as here, the discharge is unrelated to any construction or navigation project.

The terms "fill" and "fill material" are terms with well-established meanings that the Corps is not free to dismiss. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meanings . . . a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); *accord United States v. Wells*, 519 U.S. 482, 491 (1997). "Fill material" is a term of art in the engineering field, referring to an aggregated material that, when deposited in a space or

gap, enhances stability. According to the Oxford English Dictionary, in the 1800s a "fill" was "an embankment to fill up a gully or hollow," used, for example, in conjunction with "cuts" (*i.e.*, grooves or ditches) for laying railroad tracks. 5 Oxford English Dictionary 908 (2nd ed. 1989) (def. I(2)(b)). In 1972, the year the Act was enacted, the American Society of Civil Engineers defined "fill" by its verb and noun forms as: "Use of material, or material used to equalize or to raise topography to a certain grade." American Society of Civil Engineers, Definitions of Surveying and Associated Terms 69 (1972). EPA's website currently defines "filling" as the act of "[d]epositing dirt, mud or other materials into aquatic areas to create more dry land, usually for agricultural or commercial development purposes, often with ruinous ecological consequences." EPA, Terms of Environment, http://www.epa.gov/OCEPAterms/fterms.html (May 14, 2007).

Building codes and construction ordinances offer even more precise definitions of fill material and "filling," none of which extends to waste. For instance, Falmouth Maine's building code states that "[f]ill material shall mean clean soil material, rocks, bricks, and cured concrete, which are not mixed with other solid or liquid waste, and which are not derived from an ore mining activity." Falmouth, Me., Code ch. 601 § 5.34 (1991, 2003).

In the 1970s, "fill material" was used for many purposes, such as to embank roads, extend airport runways, or reclaim portions of a water body as dry land. *See, e.g., V.C. Edwards Contracting Co., Inc. v.*

Port of Tacoma, 503 P.2d 1133, 1136-37 (Wash. Ct. App. 1972) (involving placement of "fill material" for road embankment); *Traigle v. Lafayette Airport Comm'n*, 309 So.2d 904, 905 (La. Ct. App. 1975) (involving use of "fill material" to construct runway); *Agerton v. City of Lake Charles*, 273 So.2d 353, 354 (La. Ct. App. 1973) (involving placement of "fill material" to reclaim dry land). Fill material was valued as a saleable commodity, not mere waste. *See, e.g., Rheault v. Tennefos Constr. Co., Inc.*, 189 N.W.2d 626, 627-28 (N.D. 1971) (regarding unfulfilled contract to furnish "fill material" at cost of $11,706 for use in road-building).[8]

The Corps itself consistently embraced these settled definitions of the terms "fill" and "fill material," in formal regulations, the MOA, and other statements of agency policy. *See infra* at pp. 22-25. Despite the "accumulated settled meanings" of the terms fill and fill material, *see Amax Coal*, 453 U.S. at 329, petitioners now contend that fill can mean any material that can be dumped into water that might raise the water level.

Petitioners' argument has no limiting principle. If petitioners' reading of the statute is correct, a

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[8] To be sure, fill material can contain recycled content. Fill material often contains recycled and inexpensive materials such as rock, gravel, sand, compacted soil, glass chips, or concrete, depending on its engineering function, but must be of a compaction density, moisture content, and shear strength suited to its use. *See, e.g.*, 4 Bruner & O'Connor Construction Law § 14:10.

company could dump any pollutant into navigable waters of the United States and call it "fill," even if the material's discharge was otherwise forbidden by EPA and even if the discharge was only for waste disposal and not for construction or navigation. Any number of harmful substances currently regulated by EPA would become fair game, including wastes from dairy products processing, grain mills, seafood processing, cement manufacturers, leather tanning and finishing facilities, and timber products operations. *See* 40 C.F.R. parts 405, 406, 408, 411, 425, and 429. There would be little the Corps could *not* permit mining and other companies to dump in waters of the United States — including toxic mine tailings containing unlimited amounts of asbestos, arsenic, cyanide, and sulphuric acid. Indeed, Coeur Alaska seeks to dump waste containing mercury and lead. The Army Corps cannot be allowed to cloak this discharge of toxic wastes by calling it "fill."

Because the permit the Corps issued to Coeur Alaska cannot be reconciled with longstanding agency interpretations of the Corps' role under the Act and the meaning of "fill material," the Ninth Circuit properly set it aside.

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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November 14, 2008

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[9] Counsel wish to acknowledge the assistance of Melissa Birchard, a third-year law student, in the preparation of this brief.

AMICUS CURIAE BRIEF

104

No. 07-984 and 07-990

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In The
Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER, COEUR ALASKA, INC.

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QUESTION PRESENTED

Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for discharges of "fill material" provided that the discharges comply with that section's water-quality requirements, which are jointly developed by the Corps of Engineers and the Environmental Protection Agency. 33 U.S.C. § 1344(a), (b)(1). By regulation, the Corps of Engineers and the EPA have jointly defined "fill material" generally as any material that has the net effect of raising the bottom elevation of a water of the United States, including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)-(f); 40 C.F.R. § 232.2.

In this case, the Ninth Circuit held that the Corps of Engineers lacked authority under Section 404 to issue a permit for the discharge of fill material whenever the discharge implicates any effluent restriction promulgated by the EPA as part of its permit program under Section 402 of the Act. On that basis, the Ninth Circuit invalidated a Section 404 discharge permit issued to Petitioner Coeur Alaska, Inc.

The question presented is whether the Ninth Circuit erred in rejecting the expert agencies' joint interpretation of the Act that effluent restrictions promulgated as part of the EPA's Section 402 permit program do not apply to discharges of fill material permitted by the Corps of Engineers under Section 404.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. THE NINTH CIRCUIT FAILED TO ACKNOWLEDGE THAT THE TEXT OF SECTION 402 AND SECTION 404 OF THE CWA PROVIDES FOR SEPARATE AND DISTINCT PERMITTING PROCESSES 7

A. The Text Of Section 402 Reveals That Section 402 And Section 404 Are Mutually Exclusive 10

B. The Text Of Section 404 Reveals That Section 402 And Section 404 Are Mutually Exclusive 12

II. THE NINTH CIRCUIT DECISION MUST BE REVERSED; IT VIOLATED TWO WELL-ESTABLISHED TENETS OF ADMINISTRATIVE LAW 13

TABLE OF CONTENTS – Continued

Page

A. By Rejecting The Agencies' Interpretation Of The CWA And Effectively Rewriting The Regulation, The Ninth Circuit Decision Conflicts With *Chevron* 15

1. *Chevron* requires deference to accountable agencies 15

2. The instant case is on all fours with *Chevron*, requiring deference from the Ninth Circuit 18

B. By Rejecting The Corps' Interpretation Of Its Own Regulation, The Ninth Circuit Decision Conflicts With This Court's Holding In *Seminole Rock* 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 22

Boise Cascade Corp. v. EPA, 942 F.2d 1427 (9th Cir. 1991) 12

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) ..... *passim*

Brown v. United States, 113 U.S. 568 (1885) 10, 15

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County, 529 U.S. 576 (2000) 22

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, ___ U.S. ___, 2008 WL 243678 (2008) 5

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 6, 10

De Sylva v. Ballentine, 351 U.S. 570 (1956) 9

Entergy Services, Inc. v. FERC, 375 F.3d 1204 (D.C. Cir. 2004) 24

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 6

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) 11, 12

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 6, 10

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 20

TABLE OF AUTHORITIES – Continued

Page

Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336 (2001) 2

National Ass'n of Home Builders v. Defenders of Wildlife, ___ U.S. ___, 127 S.Ct. 2518 (2007) 6, 10, 17, 21

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 1

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) 22

Rapanos v. United States, 547 U.S. 715 (2006) 2, 11

Ratzlaf v. U.S., 510 U.S. 135 (1994) 12, 24

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) 2

Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005), *cert. denied*, 547 U.S. 1065 (2006) 2

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 486 F.3d 638 (9th Cir. 2006) ..... *passim*

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, No. 05-cv-00012-J-JKS, slip op. (D.Alaska Aug. 4, 2006) 4

Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994) 22

United States v. Fisk, 70 U.S. 445 (1865) 9

United States v. Hagberg, 207 F.3d 569 (9th Cir. 2000) 24

TABLE OF AUTHORITIES – Continued

Page

United States v. Larionoff, 431 U.S. 864 (1977) 22

United States v. Shimmer, 367 U.S. 374 (1961) ... 15, 16

Wards Cove Packing Corp. v. National Marine Fisheries Service, 307 F.3d 1214 (9th Cir. 2002) 22

Watt v. Alaska, 451 U.S. 259 (1981) 12

STATUTES

5 U.S.C. § 701 *et seq.* 14

33 U.S.C. § 1311(a) 7, 9

33 U.S.C. § 1311(e) 8, 9, 10

33 U.S.C. § 1316(e) 8, 9, 10

33 U.S.C. § 1342(a)(1) 8, 10, 11

33 U.S.C. § 1343(c) 18

33 U.S.C. § 1344(a) 8

33 U.S.C. § 1344(b) 18

33 U.S.C. § 1344(b)(1) 8

33 U.S.C. § 1344(p) 12, 13

Clean Water Act, 33 U.S.C. §§ 1251-1387 1

Clean Water Act, Section 301 (33 U.S.C. § 1311) 5, 6, 8, 12, 20

Clean Water Act, Section 306 (33 U.S.C. § 1316) 5, 8

TABLE OF AUTHORITIES – Continued

Page

Clean Water Act, Section 402 (33 U.S.C. § 1342) ..... *passim*

Clean Water Act, Section 404 (33 U.S.C. § 1344) ..... *passim*

REGULATIONS

33 C.F.R. § 323.2(e) 13, 23

33 C.F.R. § 323.2(f) 13

40 C.F.R. § 122.3 14

40 C.F.R. § 232.2 13

OTHER AUTHORITIES

67 Fed. Reg. 31,129 (May 9, 2002) 13, 14

Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 70-71 (2000) 22, 23, 24

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner, Coeur Alaska, Inc., in Case No. 07-984.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has been active in litigation to ensure the proper interpretation and application of the Clean Water Act, 33 U.S.C. §§ 1251-1387. *See, e.g.*, *National Wildlife Federation*

[1] In compliance with Supreme Court Rule 37(6), MSLF represents that the parties have consented to the filing of this brief. All petitioners and respondents, except for the United States, have filed letters with the Clerk of the Court consenting to the filing of *amicus* briefs. The United States' letter of consent is being filed with this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented plaintiff); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), *cert. denied*, 547 U.S. 1065 (2006) (*amicus curiae*); *Rapanos v. United States*, 547 U.S. 715 (2006) (*amicus curiae*); *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2006) (*amicus curiae*).

In addition, MSLF has over 5,000 members throughout the United States, hundreds of whom own businesses and/or property in Alaska, California, Oregon, Washington, Idaho, Montana, Arizona, Nevada, and Hawaii, the States affected by the Ninth Circuit's erroneous decision that interprets the Clean Water Act as prohibiting any discharge of pollutants. Because Congress expressly provided for the regulated discharge of pollutants under the permit regimes established in the Clean Water Act, MSLF respectfully submits this *Amicus Curiae* Brief in support of Petitioner Coeur Alaska.

STATEMENT OF THE CASE

The "Kensington Project" of Coeur Alaska, Inc., is a proposed underground gold mine that would be

located approximately 40 miles north of Juneau, Alaska.[2] J.A. 317a; 249a. The mine is at the location of the historic Kensington mine, which operated from 1897 to 1928. Pet'r Coeur Alaska Br. 5. On June 17, 2005, the U.S. Army Corps of Engineers ("Corps") issued a permit, under Section 404 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1344, that allows Coeur Alaska to discharge 1,440 tons of mine tailings per day, in slurry form, into an impoundment in Lower Slate Lake. J.A. 266a. The Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (hereinafter collectively "SEACC") filed a lawsuit in the U.S. District Court for the District of Alaska seeking, *inter alia*, to hold unlawful and set aside the Section 404 permit. Pet'r Coeur Alaska Br. 8. SEACC claimed that the permitting process should have been conducted under the more stringent requirements contained in Section 402 of the CWA, 33 U.S.C. § 1342. *Id.*

Shortly after this suit was filed, because the Corps had decided to suspend the permit and reconsider its decision, the Corps moved for a voluntary remand, which was granted by the District Court on November 14, 2005. J.A. 524a. On March 29, 2006, the Corps issued a revised Record of Decision, which further explained its rationale for issuing the permit, and reinstated the permit. *Id.*

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[2] Coeur Alaska, Inc., is a wholly owned subsidiary of Coeur d'Alene Mines Corporation.

On August 4, 2006, after the case had been reopened in light of the Corps' revised Record of Decision, the District Court granted judgment in favor of the Corps and Coeur Alaska. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, No. 05-cv-00012-J-JKS, slip op. (D.Alaska Aug. 4, 2006). J.A. 524a. The District Court held that it had to defer to the Corps' definition of "fill material" under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). J.A. 524a. Subsequently, SEACC moved the Ninth Circuit for an injunction pending appeal, which was granted on August 24, 2006. *Id.*

After the parties briefed the merits of the appeal, the Ninth Circuit reversed the District Court's decision and remanded with instructions to vacate the Corps' permit. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638, 651, n.12 (9th Cir. 2007). In so doing, the Ninth Circuit acknowledged that SEACC was not challenging the validity of the Corps' and the Environmental Protection Agency's ("EPA") joint regulations, which defined "fill material" and "discharge of fill material." *Id.* at 651, n.12 ("[W]e do not reach the validity of the regulations."). The Ninth Circuit also repeatedly acknowledged that the proposed discharge "facially" satisfied the plain language of the Corps' regulatory definition of the term "fill material." *Id.* at 644 (The discharge "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake."); *id.* at 655 ("[T]he discharge in this case

facially qualifies for the permitting scheme under § 404 of the [CWA]. . . . ").

Despite these acknowledgements, the Ninth Circuit rejected the Corps' interpretation and application of the regulations promulgated to implement Section 404. Instead, it determined that Section 404 was "a limited permit program" that was not meant to apply to the "discharge of pollutants from industrial or municipal sources." *Id.* at 646. This was especially true, the Ninth Circuit explained, "when the EPA has adopted an effluent limitation or performance standard applicable to the relevant source of pollution." *Id.* at 647. Because the EPA previously had promulgated a performance standard, pursuant to Sections 301 and 306 of the CWA, that prohibits discharges from froth-flotation mills, such as Coeur Alaska's, the Ninth Circuit ruled that the Corps violated the CWA when it issued a Section 404 permit to Coeur Alaska. *Id.* at 655.

On October 29, 2007, the Ninth Circuit denied Coeur Alaska's Petition for Rehearing *En Banc*. J.A. 552a. On November 14, 2007, however, the Ninth Circuit did stay issuance of the mandate pending the filing and disposition of a petition for writ of certiorari. J.A. 554a. On January 28, 2008, Coeur Alaska filed a Petition for a Writ of Certiorari with this Court, which was granted on June 27, 2008, and consolidated with a related petition filed by the State of Alaska. *Coeur Alaska, Inc. v. Southeast Alaska*

Conservation Council, ___ U.S. ___, 2008 WL 243678 (2008).

SUMMARY OF THE ARGUMENT

The Ninth Circuit decision cannot be allowed to stand because it blatantly violates two fundamental, well-settled principles of statutory and regulatory construction. First, it is beyond refute that statutes must be interpreted by analyzing the statutory text as a whole. *National Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S.Ct. 2518, 2534 (2007); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989))). As such, a court must "interpret the statute 'as a symmetrical and coherent regulatory scheme,'" *id.* (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

In its analysis, however, the Ninth Circuit focused its attention on Congress' use of the word "and" instead of the word "or" in Section 301 of the CWA. In so doing, it ignored other, more definitive and less ambiguous language that appears in both Section 402 and Section 404 of the CWA. When this language is considered as a "coherent regulatory scheme," it is

clear that the District Court decision should have been upheld.

Second, it is a well-settled tenet of administrative law that a court must defer to an agency's interpretation of a statute unless the agency's action constitutes an unreasonable interpretation of an ambiguous statute. *Chevron*, 467 U.S. at 842-844. Similarly, a court must defer to an agency's interpretation of its own regulation unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). The Ninth Circuit, by neglecting to apply these tests, failed to provide the proper level of deference to the agency's interpretations.

As a result of this blatant disregard for the precedent of this Court, the holding of the Ninth Circuit should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT FAILED TO ACKNOWLEDGE THAT THE TEXT OF SECTION 402 AND SECTION 404 OF THE CWA PROVIDES FOR SEPARATE AND DISTINCT PERMITTING PROCESSES.

The CWA expressly allows for the discharge of pollutants into the waters of the United States as long as the discharger holds a permit issued under one of the two permitting schemes established by the Act. 33 U.S.C. § 1311(a). The permitting schemes at

issue here are in Section 402 and Section 404 of the CWA. 33 U.S.C. §§ 1342, 1344.

Section 404 deals specifically with "discharge[s] of dredged or fill material" and requires that the Corps receive tacit approval from the EPA before it issues permits for such discharges. 33 U.S.C. § 1344(a). Under this scheme, Congress provided for the protection of water quality and the environment by requiring that all Section 404 permits comply with guidelines developed by the EPA in conjunction with the Corps ("Section 404(b)(1) Guidelines"). 33 U.S.C. § 1344(b)(1).

The other major permitting scheme, the Section 402 program, is administered by the EPA and allows the EPA to issue permits for the discharge of pollutants as long as the discharge complies with other expressly enumerated provisions of the CWA, such as Sections 301 and 306. 33 U.S.C. § 1342(a)(1). Section 301 requires that discharges from existing point sources comply with effluent limitations promulgated by the EPA. 33 U.S.C. § 1311(e). Section 306 requires that discharges from new sources comply with the EPA's technology-based "standards of performance" for that category of source. 33 U.S.C. § 1316(e).

After analyzing the statutory language, the Ninth Circuit held that fill material discharges, which fall under the Section 404 rubric, must comply, not only with the requirements of Section 404(b)(1), but also with the regulations in Sections 301 and 306, before a permit can be issued by the Corps under

Section 404. *Southeast Alaska Conservation Council*, 486 F.3d at 646-48. This conclusion was based primarily on the Ninth Circuit's analysis of Section 301(a), which provides that, "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 [section 402], *and* 1344 [section 404] of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). The Ninth Circuit decided that "[t]he use of 'and' as a connector, instead of 'or,' indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404." *Id.* at 646. In addition, the Ninth Circuit noted that Section 301(e) (33 U.S.C. § 1311(e)) applies to "all" discharges and Section 306(e) (33 U.S.C. § 1316(e)) applies to "any" discharge. *Id.*

These statutory clues, when viewed in a vacuum, would lend credence to the conclusion that fill material discharge must comply with Sections 301(e) and 306(e); however, the Ninth Circuit's rigid interpretation of the word "and" runs counter to the precedent of this Court, that holds that Congress often uses "and" and "or" interchangeably and that the meaning of the word in a particular case should be derived from the context. *See De Sylva v. Ballentine*, 351 U.S. 570 (1956) (holding that in the context of an inheritance statute "or" should be read as "and"); *United States v. Fisk*, 70 U.S. 445 (1865) (In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this,

courts are often compelled to construe "*or*" as meaning "*and*," and again "*and*" as meaning "*or.*").

Moreover, "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Brown & Williamson Tobacco*, 529 U.S. at 133 (quoting *Davis*, 489 U.S. at 809). As such, a court must "interpret the statute 'as a symmetrical and coherent regulatory scheme,'" *Id.* (citing *Gustafson*, 513 U.S. at 569). This is particularly true when, as here, a court is reviewing an agency's interpretation of a statute, because "'[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context . . . '" *National Ass'n of Home Builders*, 127 S.Ct. at 2534 (quoting *Williamson Tobacco Corp.*, 529 U.S. at 132-33). When Section 404 is viewed in the context of other statutory clues, it becomes clear that the statutory text overwhelmingly supports the conclusion that Section 404 permits for fill material discharges are issued independently from the regulations of Section 301(e) and Section 306(e).

A. The Text Of Section 402 Reveals That Section 402 And Section 404 Are Mutually Exclusive.

As the text of Section 402(a)(1) reveals, the two permitting schemes, Section 402 and Section 404, are mutually exclusive. Indeed, Section 402 expressly provides that the EPA may issue permits "[e]xcept as

provided in" Section 404. 33 U.S.C. § 1342(a)(1); *see also Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004) (a party whose activity is governed by the section 404 program "is not . . . subject to the [section 402] permitting requirements").

The determinative factor as to which of the two permitting schemes applies is whether the discharge will be "dredged or fill material" or some other pollutant. If the discharge is "dredged or fill material," then Section 404 is the exclusive permitting scheme. Indeed, this Court has explicitly stated that "[t]he Act . . . provid[es] a separate permitting program" for discharges of dredged or fill material, with Section 404 providing the regulatory scheme for such material. *Rapanos v. United States*, 547 U.S. 715, 745 (2006) (plurality opinion); *see also id.* at 760 (Kennedy, J., concurring) ("Apart from dredged or fill material, pollutant discharges require a permit from the Environmental Protection Agency . . . ").

In holding that a permit issued under Section 404 must also satisfy the requirements in Section 402, the Ninth Circuit effectively failed to give effect to this important provision of Section 402 itself. Astonishingly, the Ninth Circuit neglected to quote, cite, or even acknowledge the existence of Section 402(a)(1), which succinctly evinces the distinction between the two permitting schemes. This is particularly ironic, given that the Ninth Circuit admitted that courts "strive to avoid interpreting a statute 'in a manner that renders other provisions of the same

statute inconsistent, meaningless, or superfluous.'" *Southeast Alaska Conservation Council*, 486 F.3d at 647 (citing *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)); *Ratzlaf v. U.S.*, 510 U.S. 135, 140-41 (1994); *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

B. The Text Of Section 404 Reveals That Section 402 And Section 404 Are Mutually Exclusive.

The text of Section 404(p) expressly provides that "[c]ompliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance" with the primary permitting requirements of Section 301. 33 U.S.C. § 1344(p). Indeed, the EPA and the Corps, in a joint *amicus* brief at the Seventh Circuit, explained that the "discharge of pollutants other than dredged or fill material are generally regulated under section 402 . . . [whereas] [d]ischarges of dredged or fill material are generally regulated under section 404." *Greenfield Mills*, 361 F.3d at 946 n.14 (citing Brief of United States Environmental Protection Agency and United States Army Corps of Engineers as *Amici Curiae*, *Greenfield Mills*, 361 F.3d at 946 n.14 (brief located at 2003 WL 22733948)).

Nonetheless, in holding that a permit issued under Section 404 must also satisfy the requirements in Section 402, the Ninth Circuit effectively failed to

give effect to Section 404(p). As a result, the holding of the Ninth Circuit should be reversed.

II. THE NINTH CIRCUIT DECISION MUST BE REVERSED; IT VIOLATED TWO WELL-ESTABLISHED TENETS OF ADMINISTRATIVE LAW.

Section 404 of the CWA specifically provides for the issuance of permits "for the discharge of dredged or fill material into . . . navigable waters . . . " Thus, the applicability of Section 404 depends on the definition of "fill material."

On May 9, 2002, the Corps and the EPA published joint regulations to "clarify the Section 404 regulatory framework" and to adopt uniform definitions of "fill material" and "discharge of fill material." 67 Fed. Reg. 31,129, 31,130 (May 9, 2002). Under these regulations, "fill material" is defined as "material placed in the waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e) (Corps definition); 40 C.F.R. § 232.2 (EPA definition). The two agencies also defined "discharge of fill material" to include the discharge of "overburden, slurry, or tailings or similar mining-related materials[.]" 33 C.F.R. § 323.2(f) (Corps definition); 40 C.F.R. § 232.2 (EPA definition).

Importantly, the agencies explained that "[p]ersons or entities that discharge material to waters of the U.S. that has the effect of replacing any

portion of a water of the U.S. with dry land or changing the bottom elevation of any portion of a water of the U.S. could be regulated by [section 404]." 67 Fed. Reg. 31,129, 31,135 (May 9, 2002). Indeed, the "EPA has never sought to regulate fill material under effluent guidelines [under section 402]." *Id.* More specifically, the agencies explained that "any mining-related material that has the effect of fill when discharged will be regulated as 'fill material'" under section 404 of the CWA. *Id.*

This is consistent with the agencies' historical application of the CWA. In 1983, for example, the EPA explained that "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA" specifically "do not require [section 402] permits." 40 C.F.R. § 122.3.

Interpreting its own regulations, the Corps determined that Coeur Alaska's placement of mine tailings at the bottom of a Lower Slate Lake would be a discharge of "fill material." This determination was based on the fact that the placement of mine tailings at the bottom of the lake would "chang[e] the bottom elevation" of the lake. Accordingly, the Corps, with the concurrence of the EPA, issued a Section 404 permit to Coeur Alaska.

SEACC sought judicial review of the Corps' issuance of the permit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* The District Court rejected SEACC's challenge to the Corps' permitting decision, upholding the Corps' and

the EPA's regulations that define the terms "fill material" and "discharge of fill material" under the principles announced in *Chevron*, 467 U.S. at 842-43. Memorandum Decision, J.A. 53a. The District Court upheld the Corps' interpretation that these valid regulations authorized the issuance of the permit holding that substantial deference must be accorded to an agency's interpretation of its own regulations. *Id.* at 8-11.

The Ninth Circuit, however, reversed the District Court and remanded with instructions to vacate the Section 404 permit. *Southeast Alaska Conservation Council*, 486 F.3d at 655. In so doing, either the Ninth Circuit was rejecting the agencies' interpretation of the CWA by effectively rewriting the regulation itself or else the Ninth Circuit was rejecting the Corps' interpretation of its own regulation. Both actions are contrary to the well-established jurisprudence of this Court.

A. By Rejecting The Agencies' Interpretation Of The CWA And Effectively Rewriting The Regulation, The Ninth Circuit Decision Conflicts With *Chevron*.

1. *Chevron* requires deference to accountable agencies.

This Court has long required that deference be accorded to an agency's interpretation of a statutory scheme it is entrusted to administer. *See, e.g.*, *Brown v. United States*, 113 U.S. 568, 570-71 (1885); *United*

States v. Shimmer, 367 U.S. 374, 381-83 (1961). In *Chevron, supra,* this Court established the now universally recognized two-step analysis that a reviewing court must perform in order to implement this principle of deference:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-44 (footnotes omitted). Thus, if Congress' "silence" or "ambiguity" has "left a gap for the agency to fill," a court must defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Id.* at 842-43.

The deference required by *Chevron* is based on the principle that courts are not in a position to second guess an agency's interpretation of a congressional mandate where there is an ambiguity as to the legislative intent or where Congress intentionally left

an issue to the discretion of the agency. As Justice Stevens wisely explained:

> Judges are not experts in the field, and are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within the gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect the legitimate policy choices made by those who do.

Id. at 865-66. This approach minimizes judicial interference with the democratic accountability of the executive branch, and has been applied by this Court recently in a case interpreting the CWA. *See National Ass'n of Home Builders*, ___ U.S. ___, 127 S.Ct. 2518 (2007).

The EPA and Corps are much more knowledgeable than the courts in the areas of environmental protection and regulation as well as the area of

mining practices, and are charged with considering a variety of factors in issuing permits, including the effect of disposal of pollutants on human health or welfare, marine life, esthetic, recreation, and economic values, other possible locations and methods of disposal, and the effect on alternate uses of the water, such as mineral exploitation. 33 U.S.C. § 1343(c) (cross-referenced by 33 U.S.C. § 1344(b) as the type of criteria upon which Section 404 guidelines should be based). These factors put these agencies in the best position to achieve balance between the competing interests in the discharge of pollutants and fill material. Congress left a "gap" in the statute for the expertise of the agency to fill, and the courts must defer to agency rulemaking that fills that gap and is not contrary to any clearly expressed congressional intent.

2. The instant case is on all fours with *Chevron*, requiring deference from the Ninth Circuit.

This case fits neatly within the scope of the *Chevron* decision. In *Chevron,* the statute at issue was the Clean Air Act, which regulated, but did not define, "stationary sources" of pollution, rather than the Clean Water Act. The EPA defined a "stationary source" as including all pollution emitting activities belonging to the same industrial grouping, and this Court held that the lower court should have deferred to that definition. *Id.* at 840-41. In the instant case, Congress similarly passed a statute for the regulation of "fill material" entering waters of the United States,

the EPA promulgated a definition of "fill material," and the courts should defer to that definition. Indeed, SEACC did not challenge the validity of the definition itself. *Southeast Alaska Conservation Council*, 486 F.3d at 651, n.12.

Nonetheless, the Ninth Circuit effectively rewrote the regulations because they did not conform to the Ninth Circuit's novel interpretation of the highly technical and complex provisions of the CWA. Specifically, the Ninth Circuit held that discharges that squarely fell within the Corps' and the EPA's definition of "fill material" could not actually be considered "fill material" if those discharges were also subject to an EPA effluent limitation or standard of performance. *Id.* at 646-48. Thus, after the Ninth Circuit's radical decision, the agencies' joint definition of "fill material" now essentially reads:

> The term "fill material" means material placed in waters of the United States where the material has the effect of . . . changing the bottom elevation of any portion of a water of the United States, *unless the material may also be subject to an EPA effluent limitation or standard of performance.*

For all practicable purposes, the Ninth Circuit invalidated carefully crafted joint regulations of the Corps and the EPA and replaced them with its own rule. This replacement effectively eviscerates the congressionally authorized role of the Corps in regulating the waters of the United States because the EPA now will have permitting authority over any

discharge that may fall within a performance standard or effluent limitation applicable under Section 402 of the CWA.

In *Chevron*, however, this Court held that a reviewing court may invalidate regulations duly promulgated by the agency charged with administering a statute only "if Congress has spoken to the precise question at issue" and the agency's regulation directly conflicts with "the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Here, Congress was silent as to meaning of the operative terms in Section 404, *i.e.*, "fill material" and "discharge of fill material." Its silence on the meaning of these terms indicates that Congress implicitly granted authority to the Corps and the EPA to fill this "gap." *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 441-44 (4th Cir. 2003) (concluding that Congress's silence on the definition of "fill material" created an ambiguity for the Corps and the EPA to resolve).

Although the Ninth Circuit recognized that Congress had not "spoken to the precise question at issue" and, thus, left a "gap" for the Corps and the EPA to fill, *see Southeast Alaska Conservation Council*, 486 F.3d at 649, the Ninth Circuit effectively invalidated the joint regulations under step one of *Chevron*. 467 U.S. at 644-48. Moreover, by holding that Section 301 requires compliance with Sections 402 *and* 404, rather than deferring to the agencies' permissible construction of Section 301 as requiring compliance with Section 402 *or* Section 404 (*see*

section I, *supra*), the Ninth Circuit brazenly ignored this Court's well-reasoned rule in *Chevron*.

B. By Rejecting The Corps' Interpretation Of Its Own Regulation, The Ninth Circuit Decision Conflicts With This Court's Holding In *Seminole Rock*.

Alternatively, in ordering the Section 404 permit to be vacated, the Ninth Circuit effectively ruled that the Corps erroneously interpreted its own regulatory definition of "fill material" in issuing the permit. *Southeast Alaska Conservation Council*, 486 F.3d at 648-653. In so doing, the Ninth Circuit violated a tenet of administrative law older than *Chevron*.

Over sixty years ago, in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (emphasis added), this Court articulated the now well-known rule of deference to an agency's interpretation of its own regulations:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . *[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*

This deference principle has been followed consistently by this Court. *See, e.g., National Ass'n of Home*

Builders, 127 S.Ct. at 2537-38; *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *United States v. Larionoff*, 431 U.S. 864, 872 (1977). Adherence to this deference principle is especially important when, as in the instant case, an agency is charged with administering "'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

Under *Seminole Rock*, when a court reviews an agency's interpretation of its own regulations, its analysis is similar to that which it performs when reviewing an agency's construction of statute under *Chevron*. Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 70-71 (2000). The first step is to determine whether the regulation is unambiguous. *Id.* If the regulation is unambiguous, a court will uphold an agency interpretation that is consistent with the unambiguous regulatory language. *See id.*; *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (according no deference to an agency's interpretation that conflicted with its unambiguous regulation); *Wards Cove Packing Corp. v. National Marine Fisheries Service*, 307 F.3d 1214, 1219-20 (9th Cir. 2002) (same); *Thomas Jefferson University*, 512 U.S. at 512-18 (upholding an agency's interpretation of an unambiguous regulation). If,

however, the regulation is ambiguous, then a court must proceed to the second step and defer to the agency's interpretation, unless that interpretation "is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414; Angstreich, 34 U.C. Davis L. Rev. at 70-71.

In the instant case, neither SEACC nor the Ninth Circuit suggested that the Corps' definition of the term "fill material" was ambiguous. This is not surprising because the language in the regulation could not be clearer: "fill material" means "material placed in the waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e). In fact, the Ninth Circuit ruled that the proposed discharge in this case "facially" satisfied the Corps' definition of "fill material" "because it would have the effect of raising the bottom elevation of the lake." *Southeast Alaska Conservation Council*, 486 F.3d at 644. This ruling, in and of itself, should have resulted in the Ninth Circuit affirming the District Court.

The Ninth Circuit, however, failed to follow the *Seminole Rock* analysis. Instead, the Ninth Circuit erroneously looked at snippets of regulatory history and then concluded that the Corps could not have meant what it wrote in its regulatory definition of "fill material." *Southeast Alaska Conservation Council*, 486 F.3d at 648-53. Yet, it is axiomatic that, when the language of a statute is unambiguous, a court may not look to the legislative history in an effort to create

an ambiguity. *Ratzlaf*, 510 U.S. at 147-49 ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). If a court may not look to the legislative history in an effort to create an ambiguity in a statute, *a fortiori*, a court may not look to the regulatory history in an effort to turn an unambiguous regulation into an ambiguous one. *See United States v. Hagberg*, 207 F.3d 569, 574 (9th Cir. 2000) (statements in the regulatory history cannot alter the meaning of an unambiguous regulation); *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) ("[L]anguage in the preamble of a regulation is not controlling over the language of the regulation itself.") (quotation omitted).

In any event, even if the Ninth Circuit had been correct in its consultation of the regulatory history in an attempt to find ambiguity, that ambiguity would simply require the Ninth Circuit to apply step two of the *Seminole Rock* analysis. Angstreich, 34 U.C. Davis L. Rev. 49, 70-71. Under step two, a reviewing court must give "controlling weight" to an agency's interpretation of an ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-14.

Here, the Corps' interpretation of its own regulations, as demonstrated by its issuance of the Section 404 permit, was neither "plainly erroneous" nor "inconsistent" with its definition of "fill material." This is especially true considering that it is undisputed that placement of mine tailings at the bottom

of the lake "would have the effect of raising the bottom elevation of the lake." *Southeast Alaska Conservation Council*, 486 F.3d at 644. However, instead of giving "controlling weight" to the Corps' interpretation of its own regulation as mandated by *Seminole Rock*, the Ninth Circuit substituted its judgment for that of the Corps. *See Southeast Alaska Conservation Council*, 486 F.3d at 652-53 ("the current fill rule only applies to those tailings or other mining-related materials that are not subject to effluent limitation or standards of performance.").

CONCLUSION

This Court should reverse the decision of the Ninth Circuit.

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AMICUS CURIAE BRIEF

106

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In The
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COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,
Respondents.

ALASKA,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Page(s)

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.....2

ARGUMENT 3

I. THE SPECIFIC TYPE OF POLLUTANT DETERMINES WHICH CLEAN WATER ACT PERMIT PROGRAM COVERS A GIVEN DISCHARGE 3

A. Section 404 Permits Cover Dredged or Fill Material, While Section 402 Permits Cover "Other" Pollutants 3

B. Section 404 Permits Cover Sediment "Placed" at Specified Disposal Sites, While Section 402 Permits Cover Sediment Transported by Flowing Water.....6

C. Courts Must Defer to the Agencies' Expertise in Deciding Whether a Particular Discharge is Fill Material or Some "Other" Pollutant, and Accordingly Which Permit Program Should Apply 9

D. EPA's Comprehensive Section 402 Program for Stormwater Runoff is Designed to Control Sediment That Moves With Flowing Water (as Opposed to Fill Placed in a Specific Location).....14

TABLE OF CONTENTS *(cont.)*

Page(s)

II. THE STRINGENT REQUIREMENTS OF THE SECTION 404 PERMIT PROGRAM ADEQUATELY PROTECT WATER QUALITY 17

A. Requirements Imposed by the Clean Water Act and Agency Regulations 19

1. *404(b)(1) Guidelines* 19

2. *Public Interest Review* 23

3. *Mitigation* 25

4. *Section 401 Water Quality Certification* 28

B. Requirements Imposed by the Corps's Obligation to Comply With Other Laws 29

1. *National Environmental Policy Act (NEPA)* 29

2. *Endangered Species Act (ESA)* 30

3. *National Historic Preservation Act (NHPA)* 31

4. *Other Laws* 32

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

Cases

Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983) 10

Bennett v. Spear, 520 U.S. 154 (1997) 31

Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938 (9th Cir. 2008) 21, 23, 24

Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 537 U.S. 99 (2002) 33

Edmond v. United States, 520 U.S. 651 (1997) 5

Envtl. Def. Ctr. v. EPA, 344 F.3d 832 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) 15, 16

Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957) 5

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 10

Mall Props. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987) 23

Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989) 10

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 5

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 2007 WL 259944 (D.D.C. Jan. 30, 2007) 34

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) 4

TABLE OF AUTHORITIES *(cont.)*

Page(s)

Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998) 33

PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994) 28

Rapanos v. United States, 547 U.S. 715 (2006) 6, 18

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004) 33

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Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).....30

Tex. Indep. Prods. & Royalty Owners Ass'n v. EPA, 410 F.3d 964 (7th Cir. 2005) 16

United States v. Lucas, 516 F.3d 316 (5th Cir. 2008), *petition for cert. pending*, No. 07-1512 (filed June 2, 2008).....33

United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), *petition for cert. pending sub nom. United States v. McWane*, No. 08-223 (filed. Aug. 21, 2008) 33

Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152 (10th Cir. 2002).....23

TABLE OF AUTHORITIES *(cont.)*

Page(s)

Statutory Provisions

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (Clean Water Act):

33 U.S.C. § 1311(a) 3

33 U.S.C. § 1314(a)(4) 9

33 U.S.C. § 1319 18

33 U.S.C. § 1328(a) 4, 5

33 U.S.C. § 1341(a)(1) 28

33 U.S.C. § 1342(a)(1) 4

33 U.S.C. § 1342(b) 4

33 U.S.C. § 1342(p) 11, 15

33 U.S.C. § 1344(a) 4-5, 7

33 U.S.C. § 1344(a)(1) 17

33 U.S.C. § 1344(b) 7, 19

33 U.S.C. § 1344(b)(1) 17

33 U.S.C. § 1344(c) 7, 17-18

33 U.S.C. § 1344(e)(1) 18

33 U.S.C. § 1362(6) 6

33 U.S.C. § 1362(12)(A) 3

National Historic Preservation Act, 16 U.S.C. § 461 *et seq.*:

16 U.S.C. § 470(f) 31

TABLE OF AUTHORITIES *(cont.)*

Page(s)

Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq* 32

Wild and Scenic Rivers Act, 16 U.S.C. § 661 *et seq.*:

16 U.S.C. § 1278(a).....32

Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.* 32

Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*:

16 U.S.C. § 1456(c) 32

Endangered Species Act, 16 U.S.C. 1531 *et seq.*:

16 U.S.C. § 1536(a)(2) 30

16 U.S.C. § 1536(b)(3)(A) 30

Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*:

16 U.S.C. § 1855(b)(2) 32

National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.....29

Regulations

33 C.F.R.:

Pt. 325, app. B, § 7 29

Pt. 325, app. B, § 7(a).....29

Pt. 325, app. B, § 8 29

Pt. 325, app. C 31

Pt. 332.....26

TABLE OF AUTHORITIES *(cont.)*

Page(s)

Section 230.11 29

Section 320.3 33

Section 320.4(a) 23

Section 320.4(a)(1) 23, 24

Section 320.4(r)(1) 26

Section 323.1(e)(ii) 7

Section 323.2(f) 8

Section 332.2 26

Section 332.3 27

Section 332.3(a)(2) 26

Section 332.3(b)(2) 27

36 C.F.R.:

Section 800.2(a) 31

40 C.F.R.:

Pt. 230, subpt. E 22

Pt. 230, subpt. G 17

Pt. 230, subpt. H 17

Pt. 230, subpt. J 26

Section 122.3(b) 5-6

Section 122.26(b)(15)(i) 16

Section 230.3(q-1) 22

Section 230.10(a) 21

Section 230.10(a)(2) 21

TABLE OF AUTHORITIES *(cont.)*

Page(s)

Section 230.10(a)(3) 22

Section 230.60(b) 19-20

Section 230.61(b) 20

Section 230.70 20

Section 230.70(a) 20

Section 230.70(b) 20

Section 230.71 20

Section 230.71(c) 20

Section 230.71(d) 20

Section 230.72 20

Section 230.72(b) 20

Section 230.72(d) 20

50 C.F.R.:

Section 402.14(a) 30

Section 402.14(h)(3) 30

Section 600.905 32

Federal Register Notices

Guidelines for Specification of Disposal Sites for Dredged or Fill Material; Final Rule, 45 Fed. Reg. 85,636 (Dec. 24, 1980) 17, 22

TABLE OF AUTHORITIES *(cont.)*

Page(s)

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Processing of Dep't of Army Permits; Procedures for the Protection of Historic Properties, 55 Fed. Reg. 27,003 (June 29, 1990) 31

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TABLE OF AUTHORITIES *(cont.)*

Page(s)

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TABLE OF AUTHORITIES *(cont.)*

Page(s)

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Want, Law of Wetlands Regulation § 2.6 (2008) 23

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INTEREST OF *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioners.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. As part of the construction and development process, its members commonly obtain Clean Water Act (CWA) permits under both sections 402 and 404. NAHB has thus developed comprehensive familiarity with the CWA's permitting regimes and provides compliance advice to its members.

NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members. NAHB was a petitioner in a CWA case, *NAHB v. Defenders of Wildlife,* 127 S.Ct. 2518 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as an *amicus curiae* or "of counsel," in a number of matters involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The nature of the pollutant determines whether a particular discharge requires a CWA section 402 or section 404 permit. Section 404 strictly applies to dredged or fill material, while section 402 reaches "any" other pollutant. When dirt and sediment are involved, it is within the expertise of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to decide which permit program applies. When sediment is "placed" at a "specified disposal site" within a jurisdictional "navigable water," section 404 controls. But when sediment moves downstream with water velocity and remains suspended in or "settles" to the bottom of an aquatic body, it is an industrial discharge subject to section 402. Here, the court of appeals stepped outside its narrow role and decided that Coeur Alaska's discharge was from an industrial source that triggered section 402 requirements. It should have deferred to the Corps's determination that the discharge at issue was more appropriately fill material, within section 404.

Furthermore, the requirements that attach to each permit program are mutually exclusive. Congress did not intend that the requisites to obtain a section 402 permit be imposed on a 404 permit, and vice versa. For example, the terms and conditions of a section 402 permit for an industrial discharge must incorporate any applicable "effluent limitation guideline" (ELG). However, neither the Act nor implementing regulations provide a basis to conclude that issuance of a section 404 permit depends on satisfaction of an ELG. It was therefore wrong for the

court of appeals to vacate a section 404 permit because Coeur Alaska did not satisfy an effluent guideline for froth-flotation processes.

While ELGs are not a component of the Corps's program, by no means should the Court believe that the section 404 permit process is somehow deficient in protecting water quality. Quite the opposite. NAHB hopes that the following description of the applicable standards, procedures and methods inherent in the dredged or fill permit process will assist the Court in understanding just how difficult, time-consuming and expensive it is for private land owners to obtain section 404 approval—precisely due to the safeguards established by the Corps and EPA to preserve the integrity of aquatic ecosystems.

ARGUMENT

I. THE SPECIFIC TYPE OF POLLUTANT DETERMINES WHICH CLEAN WATER ACT PERMIT PROGRAM COVERS A GIVEN DISCHARGE.

A. Section 404 Permits Cover Dredged or Fill Material, While Section 402 Permits Cover "Other" Pollutants.

Section 301(a) makes it illegal to discharge any pollutant[2] except in compliance with various CWA provisions. 33 U.S.C. § 1311(a). One provision that

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[2] "Discharge of a pollutant" means "(A) any addition of any pollutant to navigable waters from any point source ...." 33 U.S.C. § 1362(12)(A).

renders an otherwise illegal discharge permissible is section 402, which establishes the National Pollutant Discharge Elimination System ("NPDES") program.[3] Section 402(a)(1) states:

> *Except as provided* in sections 1328 and 1344 of this title, the [EPA] Administrator may, after opportunity for public hearing, issue a permit for *the discharge of any pollutant, or combination of pollutants*, notwithstanding section 1311(a) of this title ....

33 U.S.C. § 1342(a)(1) (emphasis supplied). Section 402(a)(1)'s application to discharges of "any pollutant, or combination of pollutants," is limited by its opening clause: "Except as provided in sections 1328 and 1344 of this title ...." *Id.* The first exception carved-out from section 402 is section 318, which authorizes EPA "to permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision ...." *Id.* § 1328(a). Relevant to this case, the second exception from section 402 is section 404, which states:

> The Secretary may issue permits, after notice and opportunity for public hearings for the

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[3] "The [EPA] initially administers the NPDES permitting program for each State, but a State may apply for a transfer of permitting authority to state officials." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2525, 2531-32 (2007) (holding that EPA lacks discretion and must transfer NPDES permit issuing authority to a state that satisfies criteria set forth at section 402(b), 33 U.S.C. § 1342(b)).

> discharge of *dredged or fill material* into the navigable waters at specified disposal sites.

Id. § 1344(a) (emphasis supplied).

The CWA's text and structure are clear that the applicable permit program depends on the type of pollutant discharge at issue. Section 402 is a catch-all, generically covering discharges of "any" pollutant. If a pollutant precisely regulated by section 318 or 404 is discharged, then the more exact text applies instead of section 402. Specific statutory provisions govern over general ones. See, *e.g.*, *Edmond v. United States*, 520 U.S. 651, 657 (1997); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotes omitted).

Accordingly, section 318—not section 402—covers "specific pollutants under controlled conditions associated with an approved aquaculture project." 33 U.S.C. § 1328. And section 404—not section 402—covers discharges of "dredged or fill material." *Id.* § 1344(a). EPA's regulations (entirely ignored by the court of appeals) implement this statutory construct:

> The following discharges do not require NPDES permits:
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> . . . .

> (b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of [the] CWA.

40 C.F.R. § 122.3(b).

B. Section 404 Permits Cover Sediment "Placed" at Specified Disposal Sites, While Section 402 Permits Cover Sediment Transported by Flowing Water.

Usually, it is relatively simple to determine whether a discharge is composed of dredged or fill material, as opposed to some other pollutant. "[T]raditional pollutant[s]"—that is, mobile, soluble, and typically non-solid substances that "readily wash downstream"—are subject to the NPDES program. Cf. *Rapanos v. United States*, 547 U.S. 715, 724 (2006) (plurality). However, the CWA defines "pollutant"[4] to "cover[ ] both" solids and non-solids, and includes "toxic materials such as sewage, chemical waste, biological material, and radioactive material and the discharge of dredged spoil, rock, sand, cellar dirt, and the like." *Id.* at 774 (Kennedy, J., concurring in the judgment). See also *id.* at 807 (Stevens, J., dissenting) (regulation of "alluvium" and "silt" which "make[ ] [their] way downstream" require a CWA permit).

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[4] "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

To ascertain what CWA program applied to Coeur Alaska's discharge, the court of appeals almost exclusively focused on that bit of the agencies' regulation defining "fill material" as that which "has the effect of ... changing the bottom elevation" of a jurisdictional waterbody. 33 C.F.R. § 323.1(e)(ii). This regulatory definition does not provide a complete answer to the question of which permit program properly manages sediment discharges. Indeed, all grains of dirt and alluvium can fall to the bed of an aquatic feature and alter its elevation. Correctly, the agencies have never implemented the Act in such a manner to always treat sediment as fill.

NAHB submits that the language in section 404 itself, and a separate regulatory definition of the phrase "*discharge of* fill material," provide substantial assistance in determining which permit program covers sediment in any given situation. Whether section 402 or 404 governs depends on the difference between the *placement* of dirt at specified disposal sites, as opposed to the *settling* of solids suspended in water. The CWA states that section 404 should apply to discharges of material "into the navigable waters ***at*** specified disposal sites." 33 U.S.C. § 1344(a) (emphasis supplied). A specified disposal site is thus a more exact location within a waterbody subject to the Act's jurisdiction. Furthermore, section 404 permits must identify that precise locus where fill is discharged: "[E]ach such disposal site shall be specified for each such permit ...." *Id.* § 1344(b). Congress also gave EPA authority "to prohibit the specification of any *defined area* as a disposal site ...." *Id.* § 1344(c).

The agencies' current regulatory definition of "discharge of fill material" is consonant with Congress's conception of dirt discharged at specific, defined sites within jurisdictional waters:

> The term "discharge of fill material" ... generally includes, without limitation, the following activities: *Placement* of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; ... *placement* of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; *placement* of overburden, slurry, or tailings or similar mining-related materials ....

33 C.F.R. § 323.2(f) (emphasis supplied). The ordinary meaning of "placement" is "an act or instance of placing"; the verb "place" means "to put in a particular place ... to direct to a desired spot." Webster's New Collegiate Dictionary, at 876 (1975).[5] Accordingly, when dirt or sediment is "placed" in a particular spot (to use Congress's term, "at specified disposal sites"), then a discharge of fill material has occurred. In such instances, section 404 applies and the discharger who places fill must obtain a Corps permit.

In contrast, Congress did not require NPDES permits to specify disposal sites. Section 402 is designed to regulate sediment discharges that are *not*

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[5] See also The Concise Oxford Dictionary of Current English, at 925 (5th ed. 1964) ("place" means "Put (thing, etc.) in particular place; arrange (set of things) in their proper places").

placed in or directed to any defined site within a statutory "navigable water." In other words, dirt that flows with water and remains suspended[6] in or "settles"[7] atop the bed of a jurisdictional feature is appropriately within NPDES purview. The agencies themselves have drawn this distinction:

> Recognizing that some discharges *(such as suspended or settleable solids)* can have the associated effect, over time, of raising the bottom elevation of a water due to the settling of waterborne pollutants, *we do not consider such pollutants to be "fill material"* ....

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (Fill Rule) (emphasis supplied).

C. Courts Must Defer to the Agencies' Expertise in Deciding Whether a Particular Discharge is Fill Material or Some "Other" Pollutant, and Accordingly Which Permit Program Should Apply.

The salient point is that EPA relies on section 402 to regulate solid material like sediment moved by

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[6] The CWA provides that "suspended solids," such as sediment, is a "conventional pollutant." 33 U.S.C. § 1314(a)(4).

[7] "Settle" is defined as "to seat, bring to rest, come to rest ...to clarify by causing dregs or impurities to sink ...." Webster's New Collegiate Dictionary, at 1061 (1975). See also The Concise Oxford Dictionary of Current English, at 1162 (5th ed. 1964) ("settle" means "cease from wandering or motion or change or disturbance or turbidity (often *down*)" (italics original).

hydro-velocity, which remains suspended in a waterbody or sinks to its bottom. On the other hand, the Corps implements section 404 to regulate sediment "placed" at a "specified disposal site." Whether a discharge of sediment is more likely to move downstream with flowing water, or placed in a particular spot, "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Or. Natural Resources Council,* 490 U.S. 360, 376 (1989) (upholding Corps decision as not "arbitrary and capricious" under the Administrative Procedure Act). See also *Balt. Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination ... a reviewing court must generally be at its most deferential"); *Kleppe v. Sierra Club,* 427 U.S. 390, 412 (1976) (where analysis "requires a high level of technical expertise," court must defer to "the informed discretion of the responsible federal agencies").

This case boils down to agency deference. The Corps decided that Coeur Alaska's discharge was "fill" not only due to the fact that it raised the bottom elevation of Lower Slate Lake, but further because "1,440 tons of tailings ... in the form of a slurry" would be *placed* in the lake "each day." *S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs,* 486 F.3d 638, 642 (9th Cir. 2007). The agency was best positioned to decide that Coeur Alaska needed a section 404 permit; the court of appeals improperly afforded that determination no deference whatsoever, by concluding that the company committed a "discharge of pollutants from industrial or municipal

sources," to trigger section 402 permit requirements. *Id.* at 646.[8]

More critically, there was no statutory or regulatory basis for the court of appeals to conclude that the *Corps* could use a section 404 permit as a vehicle to enforce *EPA's* effluent limitation guideline for froth-flotation mills. As the agencies have stated in rulemaking, their "existing approach" is to regulate pollutants:

> under *either* section 402 *or* 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards *are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines.*

Fill Rule, 67 Fed. Reg. at 31,135 (emphasis supplied).

Thus, the Corps should have received deference for its decision that Coeur Alaska's discharge was fill material "placed" at a specified disposal site. This is especially so, because EPA did not otherwise conclude that Coeur Alaska's discharge was more

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[8] Through section 402(p), 33 U.S.C. § 1342(p), Congress has created a program for municipal and industrial discharges of sediment suspended in stormwater under the NPDES program. *Infra* at 14-16. Notably, it did not create the program under the auspices of section 404.

appropriately subject to section 402. EPA is accustomed to addressing suspended or settleable sediment,[9] which is significantly different in nature than dirt "placed" at a defined disposal site. In other situations, EPA has surely exercised its expertise and authority to determine that a discharge from a mining site is "any" other pollutant constituting suspended or settleable solids. In those cases an NPDES permit would be needed, which must incorporate relevant effluent limitation guidelines such as the froth flotation limitation at issue in this

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[9] See EPA, Volunteer Estuary Monitoring: A Methods Manual, Second Edition, EPA-842-B-06-003 (2d ed. March 2006), at 15-3, *available at* http://www.epa.gov/owow/estuaries/monitor/ (last visited Sept. 3, 2008) ("Suspended materials such as sand, soil, or silt tend to *settle out* faster in brackish water than in fresh water. These particles *settle to* the estuary bottom, where they smother fish eggs and bottom-dwelling animals, and alter the habitat needed by estuary plants and animals"); EPA, Office of Water, Volunteer Stream Monitoring: A Methods Manual, EPA 841-B-97003 (Nov. 1997), § 5.8, *available at* http://www.epa.gov/owow/monitoring/volunteer/stream/ (last visited on Sept. 3, 2008) ("Total solids are dissolved solids plus *suspended and settleable* solids in water .... *Suspended solids* include silt and clay particles, plankton, algae, fine organic debris, and other particulate matter. These are particles that will not pass through a 2-micron filter"); EPA, Office of Water, Volunteer Lake Monitoring: A Methods Manual, EPA 440-4-91-002, § 2.E at 17, *available at* http://www.epa.gov/volunteer/lake/lakevolman.pdf (last visited on Sept. 3, 2008) ("Not all sediment particles quickly *settle* to the lake bottom. The lighter, siltier particles often *stay suspended* in the water column or *settle so* lightly on the bottom that they can be easily stirred up and resuspended even with slight water motion .... Sediment blocks light from penetrating the water column. It also interferes with the gills of fish ....") (emphasis supplied to all).

case. Indeed, the Federal Register preamble to that very effluent guideline provides:

> The ... limitations ... in this regulation will be applied to individual gold placer mines *through NPDES permits issued by EPA or approved state agencies, under section 402 of the Act.* These requirements do not apply to individual discharges until incorporated into NPDES permits. As discussed in the preceding section of this preamble, these limitations must be applied in all Federal and States NPDES permits except to the extent that variances and modifications are expressly authorized.

Ore Mining and Dressing; Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 53 Fed. Reg. 18,764, 18,787 (May 24, 1988) (emphasis supplied).

Moreover, a *single* discharge of water containing sediment cannot simultaneously be subject to *two* permit programs. That result would improperly "conflate" the CWA's "two separate permitting mechanisms ... governing different discharges, subject to different protective requirements ...." Br. for the Federal Resp'ts in Opp'n to Cert. Pet. at 6-7, *Coeur Alaska, Inc. v. S.E. Alaska Conservation Council,* No. 07-984 (consol. with No. 07-990) (S. Ct. filed May 14, 2008). Regulatory havoc would certainly ensue if both EPA (or a state to which

NPDES authority has been transferred) *and* the Corps each must permit the very same discharge.[10]

In sum, one of the most fundamental decisions that the Corps and EPA must make is whether an activity discharges either placed "fill material" or "any" other pollutants such as settleable sediment. How could that decision possibly be the prerogative of federal judges? The court of appeals should be reversed for not deferring to the Corps's determination that section 404 controlled the mining activity in this case.

D. EPA's Comprehensive Section 402 Program for Stormwater Runoff is Designed to Control Sediment That Moves With Flowing Water (as Opposed to Fill Placed in a Specific Location).

By way of example, EPA's regulatory practice in using section 402 to control sediment suspended in liquid is best evidenced through its complex, two-phase program covering stormwater runoff. The NPDES program was initially enacted in 1972 and proved successful in imposing "pollution control

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[10] This is not to say that two discharges of different pollutants, at a single facility, might not require separate permits under each program. For example, NAHB members must obtain NPDES permit coverage for discharges of sediment in stormwater from construction sites at least one acre in size. *Infra* at 16. In addition, if construction activity at that same site requires a discharge of fill material into jurisdictional wetlands, the home builder must also obtain a section 404 permit. But the agencies have never required the home builder in this scenario to obtain four permits—that is, section 402 *and* 404 permits for the stormwater discharge, and both again for the wetlands fill.

measures for industrial process wastewater and municipal sewage ...." National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,723 (Dec. 8, 1999) (Phase II Rule). Congress later thought more was needed to protect water quality, and directed EPA to study and control "storm water runoff draining large surface areas ...." *Id.* Thus, "[i]n 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted [CWA] § 402(p), 33 U.S.C. § 1342(p)." *Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 841 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (*Environmental Defense*).

Starting in 1990 and under the authority of section 402(p), EPA developed an entirely new (and by now massive) regulatory program to control sediment transported by stormwater. First, EPA required NPDES permits for stormwater discharges from "large" municipalities generally serving populations of 100,000 persons or more, as well as several industrial categories including construction activities at sites disturbing five or more acres of land. See NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (Phase I Rule). Nine years later, EPA followed with the Phase II Rule, expanding NPDES stormwater requirements to smaller municipalities in urbanized areas, as well as construction sites that disturb one and up to five acres of land. Phase II Rule, 64 Fed. Reg. at 68,723.[11]

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[11] The legislative and regulatory history of the federal stormwater regime is discussed in *Environmental Defense*, 344

Suffice it to say that EPA governs a realm of ever-expanding permit requirements for discharges of silt and dirt moved by water, but not placed anywhere in particular. *It has done this under the rubric of section 402.* Thousands of pages of EPA regulations and "guidance" exist to address sediments transported by stormwater. From NAHB's perspective, the NPDES stormwater program affects virtually *all* residential development projects in the United States, as it applies to every construction site one acre or larger. EPA's stormwater regulations even apply to a house built on a single lot, if it is part of a subdivision that exceeds the one-acre threshold.[12]

To conclude, the Corps and EPA are best suited to determine whether the nature of a sediment discharge is more appropriately regulated under section 402 or section 404. The court of appeals should have accepted the Corps's decision that Coeur Alaska's discharge was the placement of fill material covered by section 404—to which section 402 permit conditions promulgated by EPA had no application. The court of appeals should thus be reversed.

F.3d at 841-844, and *Tex. Indep. Prods. & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 967-68 (7th Cir. 2005).

[12] See 40 C.F.R. § 122.26(b)(15)(i) ("small construction activity" requiring an NPDES permit "includes the disturbance of less than one acre of total land area that is part of a large common plan of development or sale if the large common plan will ultimately disturb equal to or greater than one...acre[]").

II. THE STRINGENT REQUIREMENTS OF THE SECTION 404 PERMIT PROGRAM ADEQUATELY PROTECT WATER QUALITY.

It is irrational to apply EPA's effluent limitation guidelines to fill material. By their very nature, ELGs are designed to regulate the pollutant concentrations in *effluent*—an aqueous substance—and not in fill material—a solid substance. Rather, the safeguards built into the section 404 process; the complicated regulations that have multiplied thereunder; and the arcane (if not downright bizarre) manner in which the program has been implemented by the agencies and interpreted by the courts, demonstrate that the regulators place paramount emphasis on water quality and environmental protection as they administer dredged or fill permits.

While Congress vested the Corps with the responsibility to issue section 404 permits (33 U.S.C. § 1344(a)(1)), EPA retains a major oversight role. It was given authority to develop "guidelines" (actually rules) governing the discharge of dredged or fill material. *Id.* § 1344(b)(1). The so-called "404(b)(1) guidelines" establish the core permitting standards that the Corps and applicants must follow. *See* 45 Fed. Reg. 85,636 (Dec. 24, 1980) (discussed *infra* at 19-23). Among other things, these guidelines regulate the types of materials that can be used for fill purposes in order to protect water quality. See generally 40 C.F.R. pt. 230, subpts. G, H. EPA can also veto Corps permits if the proposed discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery

areas (including spawning and breeding areas), wildlife or recreational areas." 33 U.S.C. § 1344(c). Finally, EPA has independent enforcement authority under section 404. *Id.* § 1319.

Before discussing the extensive permit procedures and standards which the agencies and applicants must follow to receive a Corps permit, another introductory point warrants emphasis: The section 404 process is long and expensive. "The average applicant for an individual [404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes .... 'Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.'" *Rapanos*, 126 S.Ct. at 2214 (plurality) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,* 42 Nat. Resources J. 59, 74-76, 81 (2002)). Individual[13] section 404 permits are subject to numerous requirements which conceptually fall

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[13] Aside from project-specific individual permits issued on a case-by-case basis, the Corps can also issue general permits. These are accomplished on a state, regional or nationwide basis, for "any category of activity," where the discharge of dredged or fill material "will cause only minimal adverse environmental effects" both separately and cumulatively. 33 U.S.C. §1344(e)(1). Coeur Alaska's discharge was *not* processed under a general permit, so NAHB will only discuss the standards and procedures for individual permits. It should be noted, however, that no discharge that otherwise qualifies for a nationwide permit is allowed unless conditions to protect water quality are satisfied. Reissuance of Nationwide Permits; Final Notice, 72 Fed. Reg. 11,092, 11,194 (March 12, 2007) (General Condition 21).

into two broad categories: (1) those imposed by the CWA itself, and agency regulations and policies specifically designed to protect water resources; and (2) those arising from the Corps's obligation to comply with other laws.

A. Requirements Imposed by the Clean Water Act and Agency Regulations.

Before the Corps issues a section 404 individual permit, it must follow four primary requirements which derive from the CWA and agency regulations: (1) the discharge must comply with EPA's 404(b)(1) guidelines; (2) the discharge must be considered under the Corps's "public interest review" criteria; (3) the impact on jurisdictional waters must be mitigated to offset the loss of aquatic functions and values; and (4) all Corps permits must be certified under section 401 by the state in which the discharge occurs, as complying with water quality standards. Each element is discussed in turn below.

1. 404(b)(1) Guidelines.

The CWA provides that Corps permits must satisfy "guidelines" developed by EPA. 33 U.S.C. § 1344(b). EPA's 404(b)(1) guidelines contain a number of restrictions to ensure that the discharge of dredged or fill material does not adversely affect water quality.

For example, the guidelines' subpart G provides standards and procedures for evaluating and testing the material for contaminants. Among other things, these provisions require that "the extraction site shall be examined ... to assess whether it is sufficiently

removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants ...." 40 C.F.R. § 230.60(b). Testing approaches and procedures are in place to address "potential effects" that the discharge of contaminated dredged or fill material might have "on the water column and on communities of aquatic organisms." *Id.* § 230.61(b). Additionally, subpart H provides myriad techniques to minimize the adverse effects of discharges, such as by the "choice of the disposal site,"[14] the "treatment of, or limitations on the material itself,"[15] and measures to control post-discharge effects.[16] These are only a few of the items contained in subparts G and H to protect water quality as part of the section 404 permitting process.

In addition, the 404(b)(1) guidelines require a careful evaluation of the project site where fill is discharged. They provide that "[n]o discharge of

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[14] 40 C.F.R. § 230.70. For example, adverse effects can be minimized by "[l]ocating and confining the discharge to minimize the smothering of organisms," and "[d]esigning the discharge to avoid a disruption of periodic water inundation patterns." *Id.* § 230.70 (a), (b).

[15] *Id.* § 230.71. For example, adverse effects can be minimized by "[a]dding treatment substances to the discharge material," and "[u]tilizing chemical flocculants to enhance the deposition of suspended particulates ...." *Id.* § 230.71(c), (d).

[16] *Id.* § 230.72. For example, adverse effects after the discharge has occurred can be minimized by "[c]apping in-place contaminated material with clean material," and "[t]iming the discharge to minimize impact, for instance during periods of unusual high water flows, wind, wave, and tidal actions." *Id.* § 230.72(b), (d).

dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have *less adverse impact upon the aquatic ecosystem,* so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a) (emphasis supplied); *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008). These guidelines further explain:

> [A]n alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area *not presently owned by the applicant* which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

40 C.F.R. § 230.10(a)(2) (emphasis supplied). In other words, to arrive at the least environmentally damaging alternative for a project, one of the alternatives that must be assessed before a section 404 permit will issue is an offsite alternative, which looks at other locations to accomplish the project's purpose. Applicants thus evaluate different properties *they do not own,* which would not involve any discharge to jurisdictional waters.

Moreover, the 404(b)(1) guidelines contain a critical presumption against filling "special aquatic

sites," such as wetlands.[17] Corps regulations provide that where the "basic purpose" of a project is not "water dependent" (such as to provide housing) and does not require proximity to or siting within a wetland,

> *practicable alternatives that do not involve special aquatic sites are presumed to be available,* unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

Id. § 230.10(a)(3). (emphasis supplied). Thus, when the Corps considers an individual section 404 permit application, it must presume that other less-damaging and more environmentally preferable alternatives exist when the proposed discharge is into a special aquatic site (like wetlands). Guidelines for Specification of Disposal Sites for Dredged or Fill Material; Final Rule, 45 Fed. Reg. 85,336, 85,339 (Dec. 24, 1980). If a project proposes a discharge into wetlands, the number of alternatives and the level of scrutiny applied to each alternative are substantially

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[17] Regulations define "special aquatic sites" as "geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values," including wetlands, sanctuaries, refuges, mud flats, coral reefs, pool complexes, and vegetated shallows. 40 C.F.R. § 230.3(q-1); *id.* pt. 230, subpt. E.

greater. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002).

In sum, the 404(b)(1) guidelines, including restrictions on the material used as fill, the requirement for assessing alternatives to the proposed discharge, and the presumption against projects that would fill wetlands and other special aquatic sites, provides significant protection of water quality.

2. Public Interest Review.

If the Corps finds that an application complies with the 404(b)(1) guidelines, a permit "will be granted unless the district engineer determines that it would be contrary to the public interest." 33 C.F.R. § 320.4(a); *Bering Strait*, 524 F.3d at 948. The public interest review regulations have a curious history in that they predate the CWA and are not specifically authorized by the Act. While the review itself has not been invalidated by any court, the breadth of that evaluation has been questioned. See generally Want, Law of Wetlands Regulation § 2.6 (2008) (development of public interest review under the Rivers and Harbors Act of 1899); see also *Mall Props. v. Marsh*, 672 F. Supp. 561, 565-566 (D. Mass. 1987).

The public interest review includes "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). The regulations indicate that a permit will be granted *unless* it is contrary to the public interest, with the huge qualification that the permit must comply with

the 404(b)(1) guidelines. The scope of the review is staggering:

> Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of *all those factors which become relevant in each particular case.* The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. *That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof:* among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership *and, in general, the needs and welfare of the people.*

Id.; *Bering Strait*, 524 F.3d at 948-949 (the Corps properly weighed the public interest by considering significant environmental and economic issues relating to the permitted activity).

In short, the Corps's public interest review criteria provide yet another institutional safeguard to ensure protection of water and ecosystem quality in the section 404 process.

3. Mitigation.

"Mitigation" refers to the permit applicant's obligation to offset the adverse environmental consequences of the proposed discharge of dredged or fill material.[18] Agency policy speaks in terms of a permitting "sequence" of avoidance, minimization and compensation. See Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990). Permit sequencing means that in reviewing an application, the Corps must first ensure that jurisdictional waters are avoided to the maximum extent practicable (generally accomplished through the alternatives analysis requirement). Next, the impact of any allowable discharges must be minimized (such as through the subpart G and H criteria discussed above). Only after aquatic impacts are avoided and then minimized does mitigation come into play. In virtually every permit scenario, the applicant must compensate for the loss of waters occasioned by the discharge. The "avoid, minimize, mitigate" sequencing is codified at 33 C.F.R. §

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[18] In fiscal year 2005, the Corps authorized 20,754 acres of wetland impacts, and required 56,693 acres of compensatory mitigation. *See* Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 73 Fed. Reg. 19,594, 19,603 (Apr. 10, 2008).

320.4(r)(1), and has been retained in a recent compensatory mitigation rule. *See* Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, 73 Fed. Reg. 19,594, 19,671 (Apr. 10, 2008) (to be codified at 33 C.F.R. § 332.2 (definition of compensatory mitigation)) (Mitigation Rule).

The goal of mitigation is to implement the general national policy of "no net loss" of aquatic functions and values. The new, comprehensive Mitigation Rule locks into regulation the "no net loss" standards that have evolved over time. 73 Fed. Reg. at 19670 (to be codified at 33 C.F.R. pt. 332 and 40 C.F.R. pt. 230, subpt. J.) See also Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, Regulatory Guidance Letter No. 02-2 (Dec. 24, 2002).

Compensatory mitigation is one of the most challenging aspects of a section 404 permit application. Compensating for lost functions and values is generally accomplished through one or a combination of: (a) *restoration* of degraded aquatic areas; (b) *enhancement* of existing aquatic areas (such as raising the functions of an area that is already aquatic but not degraded); (c) *establishment* (also called "creation") of new aquatic areas; and (d) preservation of existing resources. 33 C.F.R. §§ 332.2, 332.3(a)(2).[19] Each of these methods can be executed through three basic approaches: (a) purchase of

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[19] There are parallel cites to the Corps' compensatory mitigation regulations in the EPA 404(b)(1) Guidelines at 40 C.F.R. pt. 230, subpt. J.

credits in a mitigation bank (*i.e.*, a facility that has restored or created wetlands or other aquatic areas in advance); (b) payment of an in-lieu fee to an entity that will use the money to restore or create wetlands or other aquatic resources; or (c) development and implementation of a "permittee-responsible" mitigation plan. That plan could be accomplished onsite or offsite (preferably within the same watershed) and could be in-kind (addressing the same kind of aquatic resources impacted, which is preferred) or in some circumstances, out-of-kind (particularly if the resources that are being addressed through the plan are of higher function or value than the resources impacted). See generally *id.* § 332.3.

Historically, the Corps and EPA operated under a number of policies that encouraged permittee-sponsored, on-site, in-kind mitigation projects. Because of the concern over the success of such projects and the tendency to create isolated mitigation parcels surrounded by or adjacent to development activities, the Mitigation Rule creates a new hierarchy of preferences: Mitigation banks are the most preferred, followed by in-lieu fee programs, and then permittee-responsible mitigation. Mitigation Rule, 73 Fed. Reg. at 19,673-74 (to be codified at 33 C.F.R. § 332.3(b)(2)).

Accordingly, mitigation requirements incorporated into virtually every section 404 permit provide further assurances to safeguard, and often improve, water quality.

4. Section 401 Water Quality Certification.

There is more. CWA section 401 requires that before any federal permit can be issued under the Act, the applicant must secure from the state in which the activity occurs a certification that the discharge does not cause or contribute to a violation of state water quality standards. 33 U.S.C. § 1341(a)(1). See *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 374-375 (2006) (discussing section 401 process, and affirming certifications of Maine agency requiring hydropower company to maintain minimum stream flows for dam operations). The water quality certification is generally secured from the state pollution control agency except in cases where that agency does not have authority to act (such as on Indian reservations), in which case EPA must provide certification. States (or EPA as the case may be) have discretion to impose a broad range of requirements pursuant to section 401 certification, so long as the requirements are related to an effluent limitation or state law requirement designed to protect water quality. *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994) (upholding minimum stream flow requirement imposed as part of certification of a federal permit for a hydroelectric facility as necessary to comply with state water quality standards).

Accordingly, required section 401 certifications provide further, ample protection of water quality when the Corps issues a section 404 permit.

B. Requirements Imposed by the Corps's Obligation to Comply with Other Laws.

All of the items discussed above, triggered every time the Corps considers an individual section 404 permit application, derive from the CWA and agency regulations designed to protect jurisdictional "navigable waters." Additional obligations borne by the Corps external to the CWA must also be followed, providing yet more layers of protection for the broader aquatic ecosystem. Space limitations allow for only the most cursory itemization of these additional agency obligations, which have spawned their own legions of regulations, guidance, and jurisprudence.

1. National Environmental Policy Act (NEPA).

NEPA requires federal agencies, including the Corps, to consider the environmental impact of their actions. 42 U.S.C. § 4321, *et seq.* Major federal actions significantly affecting the environment require preparation of an Environmental Impact Statement (EIS). As part of the permit review process, the Corps is directed to prepare an environmental assessment (EA) "as soon as practicable after all relevant information is available ...." 33 C.F.R. pt. 325 app. B, § 7(a). If the EA concludes that the issuance of the permit will significantly affect the environment, then a full-blown EIS must be prepared. *Id.* §§ 7, 8. If the Corps determines that issuance of the permit will not have a significant environmental impact, it issues a Finding of No Significant Impact (FONSI). 33 C.F.R. § 230.11; *id.* pt. 325 app. B, § 7. The large majority of section 404 permits are processed by an EA rather

than an EIS. But of course, the NEPA process which the Corps must conduct is supplemental to the project-specific alternatives analysis, public interest review, mitigation assessment, and water quality certification that attends to every section 404 individual permit.

2. Endangered Species Act (ESA).

The Corps must also comply with its obligations under the ESA prior to issuing a permit. ESA section 7 requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS), or the National Marine Fisheries Service (NMFS), to insure that any action authorized by the agency is not likely to jeopardize the continued existence of any endangered or threatened species, or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Federal actions may not proceed if they would either jeopardize the existence of a listed species or adversely modify critical habitat. See, *e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (enjoining construction of the Tellico Dam because it would have resulted in extinction of the Snail darter).

If the proposed federal action (such as issuance of a Corps permit) "may affect" listed species or critical habitat, the federal agency initiates consultation with FWS or NMFS. 50 C.F.R. § 402.14(a). If a "jeopardy" or "adverse modification" opinion results from the consultation, FWS (or NMFS) will include reasonable and prudent alternatives to the agency's proposed action in order to avoid and minimize harm to endangered wildlife and habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If no such alternative is available and a "jeopardy" opinion is

issued, then the agency may proceed, but it does so at its peril. *Bennett v. Spear*, 520 U.S. 154, 158, 169-70 (1997). Unlike NEPA review which only requires agencies to conduct an analytical process, ESA consultation imposes a substantive limitation on the ability of federal agencies to act.

Thus, when the Corps issues a section 404 permit, it must consider the effects of allowing the discharge on endangered species and designated critical habitat.

3. National Historic Preservation Act (NHPA).

In addition to protecting wildlife resources, the Corps must protect historic resources through NHPA consultation. Section 106 of the NHPA requires any federal agency "undertaking" (like a Corps 404 permit) to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register," before approving the project. 16 U.S.C. § 470(f); 36 C.F.R. § 800.2(a). This is done through coordination with the applicable State Historic Preservation Office (SHPO) and with interested Indian tribes. NHPA requirements are notorious sources of delay for processing 404 permits because of the extremely bureaucratic approach to identifying, assessing and addressing potential historic properties (also called "cultural resources" in a more generic sense). The Corps adopted its own set of NHPA regulations in 1990 (33 C.F.R. pt. 325 app. C, 55 Fed. Reg. 27,003 (June 29, 1990)), and has launched an effort to revise them to reflect changes in regulations enacted by the Advisory Council on

Historic Preservation in recent years. 69 Fed. Reg. 57,662 (Sept. 27, 2004) (advance notice of proposed rulemaking for revising Appendix C).

4. Other Laws.

When the Corps issues a section 404 permit that could adversely affect "essential fish habitat," designated in regional fishery management plans throughout the country, it must consult with the NOAA Fisheries Service, a subagency in the Department of Commerce. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*; *id.* § 1855(b)(2) (federal agency consultation requirement). NOAA Fisheries can offer "conservation recommendations" as conditions to the section 404 permit which, if not adopted by the Corps, must be explained in writing. See generally 50 C.F.R. § 600.905 (essential fish habitat consultation procedures). Additionally, FWS and state wildlife agencies have authority to comment on section 404 permits pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. § 661, *et seq.* A number of other laws that could be triggered in the 404 process include Section 307(c) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c); the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*; and Section 7(a) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1278, *et seq.* A list of such laws typically implicated in the section 404 permitting process is found at 33 C.F.R. § 320.3.

* * *

The standards for obtaining a Corps permit are counterintuitive ("go look at property you do not

own"); technical ("assess the extraction site for contaminants"); amorphous ("practicable," "in the public interest"); and complex ("demonstrate that you can replace lost aquatic functions and values"). Before the Corps can grant a 404 permit it must adhere to multiple related processes whereby another agency has to be consulted (SHPO, FWS), which in some instances can effectively veto the project (EPA under section 404(c), or a state environmental agency under section 401 certification). Moreover, the program has been plagued over the last decade with vexing regulatory issues that seem to have no end or resolution. The most notorious of these are the scope of "navigable waters" jurisdiction after *Rapanos*,[20] and what activities constitute a "discharge of pollutants" triggering CWA permit requirements.[21]

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[20] Since *Rapanos* was handed down, eight petitions for certiorari have sought clarification on the scope of statutory "navigable waters." Two are pending. *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), *petition for cert. pending*, No. 07-1512 (filed June 2, 2008); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *petition for cert. pending sub nom. United States v. McWane*, No. 08-223 (filed. Aug. 21, 2008).

[21] See *S. Fla. Water. Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 111-112 (2004) ("discharge of a pollutant" depended on whether waterbodies at issue were "meaningfully distinct," because movement of pollutants in same body is not an "addition" requiring CWA permit; remanding to trial court for further factual findings); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002) (per curiam) (judgment "affirmed by an equally divided court" as to whether agricultural "discing" activity constituted a regulable "discharge of pollutants"); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (Corps and EPA rule defining "discharge of dredged material" to include "incidental fallback" vacated, because it did not depend on "addition" of

Such lack of clarity on so many levels makes it almost impossible for NAHB to advise its members with any certainty if they need a permit at all, or if they do, how long it will take and how much it will cost, and what their final project will look like when the Corps (and EPA, FWS, SHPO, etc.) are done with it.

That, in a nutshell, is the 404 process. The fact that effluent limitation guidelines are creatures unique to NPDES permits—and are beyond the Corps's authority to incorporate into a dredged or fill permit—by no means diminishes the safeguards in the section 404 program to protect water quality and the aquatic ecosystem. In the case at bench, the court of appeals never considered these elements of the Corps's permit procedures and standards. It was sorely mistaken when it grafted effluent limitation guidelines on to Coeur Alaska's permit, due to baseless concerns that water quality and the aquatic ecosystem were not fully considered and protected as part of the section 404 process.

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material); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 2007 WL 259944 at *4 (D.D.C. Jan. 30, 2007) (Corps and EPA rule to redefine "discharge of dredged material" again stuck as illegal, because agency's "regard[ ]" of mechanized landclearing as a discharge did not depend on an "addition" to jurisdictional waters).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

September 24, 2008

Respectfully submitted.

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

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U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007); *John R. Sand and Gravel Co. v. United States*, 128 S.Ct. 750 (2008); *Summers v. Earth Island Inst.*, 490 F.3d 687 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); and *Winter v. Natural Res. Def. Council*, 518 F.3d 658 (9th Cir. 2008), *cert. granted*, 128 S. Ct. 2964 (2008) (No. 07-1239).

AMICUS CURIAE BRIEF

106 (14) (13)

Nos. 07-984 & 07-990

SEP 2 4 2008

IN THE

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COEUR ALASKA, INC.,

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v.

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Respondents.

STATE OF ALASKA,

Petitioner,

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SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL MINING ASSOCIATION, ET AL. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. MINES HAVE LONG USED TAILINGS PONDS TO DISPOSE OF NATURAL MINING BYPRODUCTS, AND REGULATORS HAVE LONG PERMITTED THIS ACTIVITY UNDER SECTION 404 8

A. Tailings And Related Mining Byproducts Are Nothing More Than Earth And Rock 8

B. American Mines Long Have Disposed Of Tailings In Securely Impounded Tailings Ponds 9

C. For At Least 30 Years, Federal Agencies Have Applied Effluent Limitations Only To Discharges *From* Tailings Ponds, Not To Deposits *Into* Tailings Ponds 10

II. EVEN IF THE ACT WERE AMBIGUOUS ON THE TREATMENT OF TAILINGS SLURRY, THE AGENCIES' RESOLUTION OF THE ISSUE WOULD STILL BE EMINENTLY REASONABLE 14

TABLE OF CONTENTS—Continued

Page

III. THE NINTH CIRCUIT'S READING OF THE ACT WOULD MAKE IT NEARLY IMPOSSIBLE FOR MANY MINES TO LEGALLY STORE THEIR TAILINGS 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases:

Bragg v. *West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001) 9

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 7, 15, 16

Kentuckians for the Commonwealth v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) 2, 3, 20

Mylan Labs., Inc. v. *Thompson*, 389 F.3d 1272 (D.C. Cir. 2004) 16

National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 16, 17

National Mining Ass'n v. *Fowler*, 324 F.3d 752 (D.C. Cir. 2003) 2

Rapanos v. *United States*, 547 U.S. 715 (2006) 20, 21

Statutes:

33 U.S.C. § 1311 ..... 6, 7, 10, 14, 15, 17

33 U.S.C. § 1311(a) 15

33 U.S.C. § 1311(c) 15, 16

33 U.S.C. § 1316 ..... 6, 7, 10, 14, 15, 17

33 U.S.C. § 1316(e) 15, 16

33 U.S.C. § 1342 ..... *passim*

33 U.S.C. § 1344 ..... *passim*

33 U.S.C. § 1344(a) 17, 18

TABLE OF AUTHORITIES—Continued

Page

33 U.S.C. § 1344(b) 18

Rule:

S. Ct. R. 37.6 1

Regulations:

33 C.F.R. § 323.2(e) 11, 18

33 C.F.R. § 323.2(f) 13, 17

40 C.F.R. § 230.5 18

40 C.F.R. § 230.10(a) 18

40 C.F.R. § 230.70-77 18

40 C.F.R. § 232.2 ..... 13, 17

40 C.F.R. § 434 21

40 C.F.R. § 434.22 21

40 C.F.R. § 436.182 21

40 C.F.R. § 440 21

40 C.F.R. § 440.104 11

40 C.F.R. § 440.104(a) 11, 21

40 C.F.R. § 440.104(b)(1) 21

65 Fed. Reg. 21,292 (Apr. 20, 2000) 12, 17

67 Fed. Reg. 31,129 (May 9, 2002) 13

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Army Corps of Engineers, Alaska District Web site 19, 20

TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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EPA, *Record of Decision for Section 402 NPDES Permit* (June 28, 2005) 13

EPA, *Technical Resource Document: Extraction and Beneficiation of Ores and Minerals*, EPA 530-R-94-013 (Aug. 1994) 8

Knight Piesold Consulting, *Coeur Alaska, Inc. Kensington Project: Slate Creek Lakes Tailings Storage Facility Report on Water Quality Monitoring* (Feb. 2003) 9

National Mining Association, *The Economic Contributions of the Mining Industry in 2005* (2007) 2

Surface Mining (Bruce A. Kennedy, 2d ed. 1990) 22

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BRIEF AMICI CURIAE OF THE NATIONAL MINING ASSOCIATION, ET AL. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The National Mining Association ("NMA") is a national trade association that represents all aspects of

[1] Pursuant to Supreme Court Rule 37.6, *amici* note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a

the mining industry, including producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced $78.4 billion of finished mineral, metal, and fuel products. These products were in turn used to create an additional $2 trillion worth of consumer and industrial goods. *See* National Mining Association, *The Economic Contributions of the Mining Industry in 2005*, at 3 (2007).[2]

The NMA works with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. It also participates in litigation raising issues of concern to the mining community, *see, e.g.*, *National Mining Ass'n* v. *Fowler*, 324 F.3d 752 (D.C. Cir. 2003), and has been involved in cases, like this one, in which parties have attempted to challenge the jurisdiction of the Army Corps of Engineers (the "Corps") to issue permits for "fill material" under the Clean Water Act. *See, e.g.*, *Kentuckians for the*

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monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. All petitioners and respondents except the United States have done so *via* consent letters filed directly with the Clerk; a copy of the United States' consent letter is being filed with the Clerk together with this brief.

[2] *Available at* www.nma.org/pdf/pubs/mining_economic_report.pdf.

Commonwealth v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003).

Amici the Alabama Coal Association, Arizona Mining Association, Coal Operators and Associates, Colorado Mining Association, Illinois Coal Association, Idaho Mining Association, Indiana Coal Council, Kentucky Coal Association, Nevada Mining Association, New Mexico Mining Association, Northwest Mining Association, Ohio Coal Association, Pennsylvania Coal Association, Utah Mining Association, and West Virginia Coal Association represent the interests of the coal and mining industries at the state level. Their goals are to provide effective industry leadership, enhance the industry's ability to compete, and educate citizens about the wise use of America's energy and mineral resources.

The *amici* have a substantial interest in this case. The Ninth Circuit held below that mines must obtain Section 402 effluent-discharge permits from the Environmental Protection Agency ("EPA"), instead of a Section 404 "fill" permit from the Corps,[3] anytime the excess rock and dirt produced by their operations happens to contain a substance covered by one of EPA's myriad effluent limits. The Ninth Circuit's rule is wrong not just because of its counter-textual interpretation of the Act; it is also wrong because it ignores the practical realities of mining that both the Corps and EPA carefully considered in fashioning the "fill" rule. As petitioners have correctly explained, fill material produced by mines will often contain some substance regulated by EPA's effluent

[3] Sections 402 and 404 are codified at 33 U.S.C. §§ 1342 and 1344, respectively.

limits, whether it be process water or bits of the mined metal itself. By its very nature, this voluminous fill material could never qualify for a permit under Section 402, which is designed to regulate discharges measured in parts per million, not in millions of tons. As a result, some mines—those whose topographical or environmental settings make storage within waters the only feasible method of disposal—may well be left without any legal way to store the huge quantities of excess rock their operations produce.

Brushing aside the considered judgments of the Corps and EPA—and ignoring 30 years of industry practice—the Ninth Circuit announced a rule that threatens the economic vitality of both the mining industry and the communities in this Nation that rely on that industry. Were this Court to endorse the Ninth Circuit's approach, many mines would be forced to cease operations because they could not, as a practical matter in many areas of the country, dispose of the tailings all mines inevitably generate. Such closures would jeopardize the economies of the States in which these mines operate and the livelihoods of the many men and women they employ. This Court should reverse the ruling below.

SUMMARY OF ARGUMENT

1. Respondents Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") would have this Court conceive of the mine discharge at issue here as "process wastewater" that just happens to have some particles of solid material floating in it. SEACC Brief in Opposition ("SEACC BIO") 10; *id.* at 4 n.2. That is wrong—and the inaccuracy is no small

matter. On the contrary, recognizing exactly what will be discharged into Lower Slate Lake is critical in understanding how the Clean Water Act's mutually exclusive permitting regimes under Sections 402 and 404 operate.

The Ninth Circuit recognized, and no party disputes, that the mine "tailings" placed in Lower Slate Lake would be largely solid—a slurry composed of 55 percent earth and crushed rock by weight. Pet. App. 6a. These solid materials also would be massive: 1,440 tons of tailings would be placed in the lake each day, enough to raise the lake bottom by 50 feet over the life of the project. *Id.* The tailings therefore fall squarely within the regulatory definition of "fill" jointly promulgated by the Corps and EPA in 2002—a regulation that, as petitioners correctly note, has not been challenged in this litigation. For that reason the mine is subject to the Section 404 permitting scheme designed by Congress to govern the placement of fill in jurisdictional waters.

SEACC hinges its contrary argument on the fact that the fill material happens to contain a component—process wastewater—that, standing alone, is subject to an effluent limit. But solid rock tailings that would otherwise qualify as "fill" do not lose that status merely by dint of some additional water. After all, whether deposited in the lake in dry or slurry form, the solid-rock tailings will satisfy the regulatory definition of "fill": They will raise the elevation of the lake bottom. As petitioners correctly explain, the Act's plain language creates an entirely separate regulatory scheme for "fill" and leaves the relevant agencies (EPA and the Corps) discretion to define the term. Coeur Alaska Br. 32-39. Since the

discharge at issue is squarely within the definition of "fill" that those agencies promulgated, and since that definition is not challenged here, this Court should reverse the Ninth Circuit's decision below.

2. But even if SEACC were correct that the language of Sections 301 and 306 requires all discharges—even those of "fill"—to comply with effluent limits, that would only create a conflict in the Act; Sections 301 and 306 would be at war with Section 404. SEACC has offered no reason why the expert agencies are not entitled to reasonably resolve that purported conflict. Indeed, they plainly are. And that is exactly what they did by jointly adopting the "fill" rule.

Under that definitive regulation, the agencies deemed tailings slurry—a mostly solid substance that the agencies knew full well often contains process wastewater—to be "fill" governed by the Section 404 permitting regime. That choice makes good sense. After all, tailings typically are deposited in secure impoundments designed to hold massive quantities of earth and rock. As a result they act like fill material: They raise the bottom elevation of the entire impounded water body and replace water with dry land. They thus are most naturally regulated under Section 404, regardless of the components the earth and rock might contain. At the same time, EPA and the Corps pay proper homage to Section 402 and its effluent limits: The agencies ensure that tailings do not cause impurities in *other* jurisdictional waters—those whose bottom elevations are not being altered—by treating any water that escapes from the impoundments as a source subject to Section 402. This is an eminently reasonable resolution

of any tension between Sections 301 and 306 on the one hand and Section 404 on the other. Thus even if this Court deems the Act ambiguous on the question whether "fill" containing an effluent may be regulated under Section 404, it should uphold the agencies' reasonable resolution of that question under *Chevron* step two. *See Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984).

3. SEACC's proposed approach to the regulation of fill containing effluent materials is not only wrong as a legal matter but also entirely unworkable. Tailings and other related mining byproducts, such as the "overburden" produced by surface mines, naturally contain any number of materials—from iron to manganese to "suspended solids"—that are the subject of effluent limitations. And when mines store these solid byproducts, they must do so in massive quantities—amounts that far exceed the strict parts-per-million limitations on effluent discharges that regulations applicable under Section 402 establish. The upshot of SEACC's proposed rule, in short, is to effectively (1) outlaw tailings ponds altogether and (2) render next to impossible the placement of run-of-the-mill mining byproducts, such as earth and rock, in water bodies. Such a rule, if endorsed by this Court, could shutter a number of American mines. After all, in many areas of the country—particularly where much of the land is dotted with wetlands and streams or crisscrossed with ephemeral drainages deemed to be "waters of the United States"—the *only* feasible way to store mining materials is to place them in waters that the Corps and EPA have traditionally considered jurisdictional under the Clean Water Act.

ARGUMENT

I. MINES HAVE LONG USED TAILINGS PONDS TO DISPOSE OF NATURAL MINING BYPRODUCTS, AND REGULATORS HAVE LONG PERMITTED THIS ACTIVITY UNDER SECTION 404.

A. Tailings And Related Mining Byproducts Are Nothing More Than Earth And Rock.

Mining operations dislodge large amounts of rock and earth, only a small percentage of which contain ore.[4] The initial process of separating ore-containing rock from the rest is called "beneficiation." *See* EPA, *Technical Resource Document: Extraction and Beneficiation of Ores and Minerals*, EPA 530-R-94-013, at 1-16 (Aug. 1994).[5] After beneficiation is complete, the ore-containing rock is shipped off for further processing; the material left behind is known as "tailings." Tailings are, as the Ninth Circuit acknowledged, nothing more than ground-up rock and earth. Pet. App. 4a. And they frequently have a muddy consistency because beneficiation often involves combining the mined rock and earth with water and chemicals in order to separate out ore-bearing materials. *See* EPA, *Development Document*

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[4] With copper mines, for example, "[t]he amount of marketable copper produced is small compared to the original material mined. * * * Several hundred metric tons of ore must be handled for each metric ton of copper metal produced, thus generating large waste quantities." EPA, *Copper Mining and Production Wastes*, *available at* http://www.epa.gov/rpdweb00/tenorm/copper.html.

[5] *Available at* www.epa.gov/osw/nonhaz/industrial/special/mining/techdocs/gold/goldch1.pdf.

for Final Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category 18-26, EPA No. 440/1-82/061 (Nov. 1982) ("1982 Development Document").[6] Some of that water remains mixed in the tailings after the process is complete, leaving the tailings in semi-solid or "slurry" form. *See* SER 295-296 (Knight Piesold Consulting, *Coeur Alaska, Inc. Kensington Project: Slate Creek Lakes Tailings Storage Facility Report on Water Quality Monitoring* 8-9 (Feb. 2003)).[7]

B. American Mines Long Have Disposed Of Tailings in Securely Impounded Tailings Ponds.

The mining process thus leaves mine operators with massive quantities of muddy, ground-up rock to dispose of. And while some of these tailings can be reinserted into the mine, many tons cannot. That is because "rock taken from its natural state and broken up naturally 'swells,' perhaps by as much as 15 to 25%." *Bragg* v. *West Virginia Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001). Mines therefore rely on storage facilities to hold the excess tailings.

The conventional storage method for at least the last 30 years has been to build a "tailings pond." A tailings pond is made by (1) creating an embankment or a containment dam by encircling or crossing an existing body of water, and then (2) pumping the tailings slurry into the impounded area for storage.

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[6] *Available at* http://nepis.epa.gov/EPA/html/Pubs/pubtitleOAR.htm.

[7] "SER" refers to the Supplemental Excerpts of Record filed in the Court of Appeals.

The tailings-pond method has several advantages. First, in some cases it avoids the creation of huge, unsightly mountains of tailings—mounds that can grow as high as 300 feet. Second (and as discussed further *infra* at 19-22), it may be the only feasible disposal technique in large portions of the country where the landscape is heavily dotted with wetlands, streams, or ephemeral drainages. And third, because the impoundment is securely walled off, it ensures that the solids and minerals in the tailings will not flow into a nearby water supply.

C. For At Least 30 Years, Federal Agencies Have Applied Effluent Limitations Only To Discharges *From* Tailings Ponds, Not To Deposits *Into* Tailings Ponds.

For many years, the EPA and the Corps have consistently taken a bifurcated approach to tailings ponds. On the one hand, they have authorized tailings deposits *into* the tailings ponds as "fill" under Section 404. On the other hand, they have applied Section 402 and its effluent limits[8] to any subsequent release of liquids *from* those tailings ponds that might reach non-impounded waters.

This regulatory dividing line makes good sense. Tailings are enormous in volume and are largely made up of rock. They cannot be assimilated into bodies of water like the microscopic effluents regulated under Section 402 can. Tailings instead displace water and create either dry land or a water body of a different size and shape. They therefore fall squarely into the regulatory definition of "fill material" that triggers Section 404 permitting:

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[8] *See* 33 U.S.C. §§ 1311, 1316.

material that "has the effect of * * * [r]eplacing any portion of a water of the United States with dry land" or "[c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e). And because they are largely solid, the tailings cannot possibly meet Section 402's associated effluent limitations, which typically cap mineral and solids contents in water at some small number of parts per million. *See, e.g.*, 40 C.F.R. § 440.104(a). These limitations, in short, were never meant to apply to tailings.

1. The EPA and the Corps have recognized for more than 30 years that mine operators, so long as they comply with Section 404, may cordon off small bodies of water and use them to store wet tailings as fill material in isolation from other water bodies. Throughout that time, the EPA and the Corps have likewise recognized that Section 402 and its associated effluent limitations do not apply to the discharge of tailings into those isolated tailings ponds. Rather, Section 402 comes into play only if there is a discharge of pollutants from the tailings-storage facility into downstream waters.

The agencies have consistently hewed to this regulatory division of labor. In 1985, the Corps issued a Section 404 permit that authorized the Red Dog mine in Alaska to place lead and zinc tailings into an impoundment made from wetlands and a creek. *See* SER 836, 978-979. Even though the tailings were discharged as slurry, and even though there is an effluent limitation for discharges from lead and zinc mines, *see* 40 C.F.R. § 440.104, only a Section 404 permit was required for deposits into the tailings pond. Discharges from the tailings pond to adjacent

non-impounded waters, however, were subject to Section 402. *See* SER 836. Likewise, in 1994 the Corps issued a Section 404 permit for the Fort Knox gold mine's tailings impoundment, established in a creek and adjacent wetlands. *Id.* at 837, 983-991. This tailings pond also did not require a Section 402 permit. *Id.* at 837.[9]

2. This same regulatory approach to tailings ponds continued through the more recent EPA and Corps rulemaking. In the 2000 document proposing the current definition of "fill material," for instance, the agencies discussed a common technique by which excess coal-mining residue ("overburden") is placed in valley streams, with dammed "sedimentation ponds" built downstream to catch and isolate any runoff from the fill. *See* 65 Fed. Reg. 21,292, 21,295 (Apr. 20, 2000). The agencies wrote that the fill and the sedimentation ponds "should be regulated under CWA section 404" while any effluent subsequently "discharged into waters of the U.S. *from* sedimentation ponds" would require Section 402 permits. *Id.* at 21,295-96 (emphasis added). The final regulations confirm this approach in clear terms. The promulgating document stated that "EPA has *never* sought to regulate fill material under effluent guidelines,"

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[9] SEACC has suggested that from 1982 "until 2005, the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill—or from any other source subject to EPA effluent limitations—into navigable waters." SEACC BIO 1. Not so. As Coeur Alaska's opening brief explains, the Corps has time and again authorized Section 404 permits for mine tailings even when an EPA effluent limitation existed that would have applied had the discharged material not otherwise qualified as "fill material." Coeur Alaska Br. 40-43.

67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (emphasis added), and the regulations themselves define "discharge of fill material" to include "placement of overburden, *slurry*, or *tailings* or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2 (emphases added).

Finally, the Corps and EPA's longtime approach was never altered during the decade-long review of the Kensington project. In 1994, the EPA wrote that an earlier Coeur plan, which proposed building a tailings impoundment in a creek, implicated Section 402 in only one respect: "whether or not * * * a discharge *from the impoundment* would meet applicable effluent limits." *See* SER 446 (EPA, *Kensington Gold Mine Project: Technical Assistance Report for the U.S. Army Corps of Engineers Alaska District* v (Oct. 1994)) (emphasis added). In August 2004, the EPA likewise wrote that certain Section 402 requirements applied not to the tailings pond itself, but only to "discharge *from*" the pond "into East Fork Slate Creek." *See* SER 427 (EPA, *EPA's Detailed Comments on the Kensington Gold Project* (Aug. 2004)) (emphasis added). In June 2005, the EPA wrote that a Section 402 permit was required only for "discharge *from* the tailings storage facility." *See* SER 536 (EPA, *Record of Decision for Section 402 NPDES Permit* 3 (June 28, 2005)) (emphasis added). And in March 2006, the Corps noted that the discharge of water to the downstream Slate Creek—but not the discharge of wet tailings into the tailings pond—was subject to a Section 402 permit. *See* SER 556 (Army Corps of Engineers, *Record of Decision and Permit Evaluation* 2 (Mar. 29, 2006)). Thus, until the Ninth Circuit's decision in this case, both regulators and the industry enjoyed a clear under-

standing of how the Clean Water Act applies to tailings ponds: Section 404 applies to the discharge of tailings into segregated impoundments, while Section 402 applies to the discharge of pollutants or impurities into downstream waters.

II. EVEN IF THE ACT WERE AMBIGUOUS ON THE TREATMENT OF TAILINGS SLURRY, THE AGENCIES' RESOLUTION OF THE ISSUE WOULD STILL BE EMINENTLY REASONABLE.

Amici agree with petitioners and with the federal respondents that the Clean Water Act's plain language is dispositive: The Act creates a bifurcated permitting scheme and mandates that any material falling within the definition of "fill" be regulated by the Corps pursuant to a Section 404 permit. *See* Coeur Alaska Br. 22-29; *accord* Brief for the Federal Respondents Supporting Petitioners 13-14 ("SG Brief") ("The text, purpose, and structure of both the Act and the 2002 fill rule * * * make clear that discharges of 'fill material' are subject only to the Section 404 permitting process."). However, even if this Court were to reject that interpretation, and even if it were to further agree with SEACC that Sections 301 and 306 mandate that *all* discharges—even those constituting "fill"—meet effluent limits, that would not support the result reached by the Ninth Circuit below. Instead, it would simply create a statutory ambiguity; the agencies entrusted to fulfill Congress's commands would be left to reconcile conflicting statutory mandates. In that circumstance the Court should defer to the expert agencies' resolution of the issue—a resolution that is clear, that is of long standing, and that reasonably balances the

concerns that led Congress to create two separate permitting regimes in the first place.

1. SEACC argues that Sections 301(e) and 306(e) of the Act apply even to "fill," thus banning the placement of much fill material in jurisdictional waters unless that fill material can meet the Act's effluent limits—limits it could never possibly meet. SEACC BIO 16-24. Petitioners and the Solicitor General have cogently explained why this argument is fallacious, *see* SG Brief 23-24 (explaining why the word "and" in Section 301(a), a key to SEACC's argument, cannot bear the weight SEACC would assign to it); *id.* at 25 (debunking SEACC's reliance on Section 306(e)), and *amici* agree with their analysis. But even if SEACC's argument were correct, it would not follow that the Ninth Circuit's decision below—resolving the case in SEACC's favor at *Chevron* step one—was the right one. Instead, one would be left with an irreconcilable statutory conflict between Section 404, which authorizes the Corps to issue permits for placement of any and all "fill," and Sections 301 and 306, which (as SEACC reads them) would forbid the Corps from issuing Section 404 permits for placement of many kinds of fill.[10]

This conflict is precisely the sort of statutory ambiguity that may be resolved by expert agencies—and whose resolution thereby is entitled to judicial deference. As this Court explained just last year, when one statutory command would "implicitly abrogate or repeal" another and "[a]n agency cannot simultaneously obey the differing mandates" of the two, the

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[10] Even SEACC agrees that the Act does not require mines to seek *both* Section 402 and Section 404 permits for placement of fill. SEACC BIO 19.

court is "left with a fundamental ambiguity that is not resolved by the statutory text." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007). The Court therefore looked to the relevant agency's authoritative interpretation; finding that interpretation "reasonable in light of the statute's text and the overall statutory scheme," the Court held that it was "entitled to deference under *Chevron*." *Id.* Indeed, this principle—that an agency's resolution of warring statutory mandates is analyzed under *Chevron*—is not open to serious dispute. The courts have long approached statutory-conflict questions in just this way. *See, e.g.*, *Mylan Labs., Inc.* v. *Thompson*, 389 F.3d 1272, 1281 (D.C. Cir. 2004) (noting that "the FDA was called upon to construe the statutes so as to resolve * * * two conflicts" and holding that "the FDA did so in a way that reflects a permissible construction of the applicable FDCA provisions and therefore satisfies *Chevron*").

2. This well-established principle of agency law should resolve the case in petitioners' favor even if the Court rejects petitioners' plain-language argument and even if the Court further agrees with SEACC that Sections 301(e) and 306(e) have some bearing on the matter at hand. After all, here, as in *National Association of Home Builders*, the relevant agencies "cannot simultaneously obey the differing mandates" of Section 404 on the one hand and SEACC's vision of Sections 301 and 306 on the other. 127 S. Ct. at 2534. Here, as in *National Association of Home Builders*, the expert agencies have offered an authoritative resolution of the purported statutory conflict, deciding after notice and comment that the term "fill" includes "slurry" and "tailings," both of which the agencies well knew often include effluents

otherwise governed by Section 402. 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2. And here, as in *National Association of Home Builders*, the agencies' interpretation is "reasonable in light of the statute's text and the overall statutory scheme." 127 S. Ct. at 2534. That is so because, as described *supra* at 8-10, tailings and tailing slurry are largely solid discharges that replace waters with massive quantities of dry land and that are placed at "specified disposal sites." 33 U.S.C. § 1344(a). They therefore squarely implicate the concern that animated Congress's decision to create a separate Section 404 permitting scheme in the first place—namely, a concern for "the loss of a portion of the water body itself." 65 Fed. Reg. 21,293 (Apr. 20, 2000). At the same time, the agencies have made sure to hew to Congress's goal of cleaner jurisdictional waters by applying Section 402 to discharges *from* fill placements and therefore ensuring that these placements do not affect downstream water bodies. *See supra* at 10-14. This is a wholly sensible approach to any tensions between Sections 301, 306, and 404.

3. SEACC's apparent concern with this resolution is that mines will bypass the EPA's effluent-discharge limits by mixing pollutants with a trace amount of tailings, calling it "fill," and indiscriminately releasing the combination into America's waterways. But this concern is chimerical; the agencies' approach to tailings is much more sensible than that. For at least 30 years, the EPA and the Corps have required that tailings be deposited in "specified disposal sites." 33 U.S.C. § 1344(a). In the tailings context, these typically have been secure, impounded tailings ponds that prevent the liquid components of the deposit from commingling with

surrounding waters. The tailings ponds accept huge quantities of crushed rock and dirt that indisputably change the bottom elevation and thus fall comfortably within the agencies' definition of "fill material." *See* 33 C.F.R. § 323.2(e). The Ninth Circuit's quest for a limiting principle was therefore unnecessary. Tailings ponds are well-regulated phenomena that bear no resemblance to the environmentally apocalyptic vision of companies dumping polluted water into open rivers and lakes and calling it "fill" based on some microscopic elevation change. Fill is never disposed of in the manner SEACC envisions.

Moreover, it is important to recognize that Section 404 permits are not up for grabs for all comers. To the contrary, Congress mandated that the Corps must follow guidelines jointly promulgated by the EPA and the Corps. *See* 33 U.S.C. § 1344(b). Known as the 404(b)(1) Guidelines, these standards require the Corps to determine (i) whether impacts of a proposed discharge on waters of the United States have been avoided to the maximum extent practicable; (ii) whether any remaining impacts have been minimized; and (iii) whether the discharger should compensate for unavoidable losses through restoration, creation, enhancement, or preservation of aquatic resources. *See* 40 C.F.R. §§ 230.5; 230.10(a), (d); 230.70-77. As the EPA and the Corps have recognized, the 404(b)(1) Guidelines ensure that mining operations "avoid adverse impacts and offset unavoidable adverse impacts." Army Corps of Engineers & EPA, *Memorandum Of Agreement Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines* (Feb. 7, 1990), *reprinted at* 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990). SEACC's implication that the agencies' resolution of

this issue is unreasonable because it will allow mines to make end-runs around the Act is therefore unwarranted. If the Court deems the Act ambiguous, it should defer to the agencies' eminently reasonable regulation laying out the dividing line between their respective jurisdictions.

III. THE NINTH CIRCUIT'S READING OF THE ACT WOULD MAKE IT NEARLY IMPOSSIBLE FOR MANY MINES TO LEGALLY STORE THEIR TAILINGS.

Finally, it should be emphasized that this Court's decision is of great practical import to America's mines and the communities they serve (and employ). That is because the Ninth Circuit's ruling effectively adopts by judicial fiat a categorical ban on an established industry practice that—if outlawed—would make it virtually impossible, or at least extraordinarily burdensome, for some mines to legally dispose of tailings and other excess rock and dirt from their mining operations.

1. In large swaths of the nation where a significant proportion of American mines are located—Alaska, the mountain West, the Southwest, and portions of the Midwest and Appalachia—the terrain surrounding ore deposits is covered with wetlands, streams, or dry washes and arroyos. In Alaska, for example, 170 million acres, or 43 percent of the State, consist of wetlands. *See* Corps, Alaska District Website.[11] Similarly, in the Appalachian Mountains—stretching from Pennsylvania to Alabama and running through Kentucky, Virginia, and West Virginia—the bottom

[11] *Available at* http://www.poa.usace.army.mil/hm/default.htm.

of mountain hollows are the only stable locations that mines have to place excess rock. As a basic matter of topology, these hollows naturally form streams, which in turn are regulated as waters of the United States under the Clean Water Act. *See generally Kentuckians*, 317 F.3d 425. And in the Southwest, the terrain is crisscrossed with a network of small ephemeral washes and arroyos that may be deemed to be waters of the United States. Although the washes are dry during most of the year, they carry runoff after storms. *See* David W. Love & Allen Gellis, *What Decision Makers Should Know About Arroyos in New Mexico* (2001).[12] Given the mammoth scope of mining operations in this part of the country, it is virtually impossible to construct a tailings impoundment—even one that is essentially a "dry stack"—without filling one or more of these ephemeral streams or washes.

Needless to say, mining operations throughout the country—from Alaska to Appalachia and many areas in between—will often have "no practicable alternative" but to store tailings in impoundments created by walling off an existing pond, stream, or other wetland. JA 93a (Army Corps & EPA, *Response to Comments Document for Final Rule Amending the EPA's and Corps' CWA § 404 Definitions of "Fill Material" and "Discharge of Fill Material"* (May 3, 2002)). Given the broad reach of the Act, which extends not just to traditional navigable waters but also perhaps to all wetlands and streams with such a "significant nexus" to navigable waters as to affect their "integrity," *Rapanos* v. *United States*, 547 U.S.

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[12] *Available at* http://geoinfo.nmt.edu/geoscience/hazards/arroyos.html.

715, 781 (2006) (Kennedy, J., concurring in the judgment), most such wetlands and streams are subject to federal permitting requirements.

2. The panel's statutory construction renders tailings ponds unpermittable in a wide range of situations. That is because the EPA has promulgated effluent limitations for a vast number of substances commonly present in the excess rock and dirt from mines located throughout the country. For example, process water from froth-flotation mills is governed by effluent limitations not just for gold mining, but also for the mining of copper, lead, zinc, silver, and molybdenum. 40 C.F.R. § 440.104(b)(1). Likewise, coal processing operations are governed by effluent limitations capping the iron, manganese, and "total suspended solids" that may be present in the discharge. *See id.* § 434.22. Phosphate mines are governed by an effluent limitation that caps the total suspended solids that may be present in process water from those operations. *See id.* § 436.182. And the list goes on. *See generally id.* pts. 434, 440. Under the panel's reading of the Act, the tailings produced by all such mines would be subject to effluent limitations, even though they cannot possibly meet those limitations. After all, a half-solid tailings deposit will never meet a "total suspended solids" limit designed for microscopic particles measured in parts per million.[13]

The bottom line is that, under the Ninth Circuit's approach, many mines could no longer use the long-accepted tailings-pond technology. And because it is topographically impossible or exorbitantly cost-

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[13] *See* 40 C.F.R. § 440.104(a).

prohibitive to avoid a "water[ ] of the United States" in areas like Alaska, the mountain West, the Southwest, and portions of the Midwest and Appalachia, a decision by this Court affirming the Ninth Circuit might well make it impossible, or nearly so, for these mines to legally dispose of their tailings. That result would not only undermine 30 years of industry practice; it would jeopardize a vital industry and the economies of the States in which these mines play such an important role. "Since prehistoric times, mining has been integral and essential to man's existence." *Surface Mining* 1 (Bruce A. Kennedy ed., 2d ed. 1990). That is as true now as ever. In these challenging economic times, and in an era when mining for minerals critical to our economy and national security is of paramount importance to so many Americans, the Court should not endorse a rule with such ruinous potential.

CONCLUSION

For the foregoing reasons, and those in petitioners' briefs, the Court should reverse the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 07-984 & 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE NONDALTON TRIBAL COUNCIL, THE NEW STUYAHOK TRADITIONAL COUNCIL, THE KOLIGANEK VILLAGE COUNCIL, THE EKWOK TRIBAL COUNCIL, THE CURYUNG TRIBAL COUNCIL, NUNAMTA AULUKESTAI, NAKNEK FAMILY FISHERIES, ALASKA INDEPENDENT FISHERMEN'S MARKETING ASSOCIATION, BRISTOL BAY DRIFTNETTERS' ASSOCIATION, AND RENEWABLE RESOURCES COALITION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. MANY TIMES LARGER THAN THE KENSINGTON MINE, THE PROPOSED PEBBLE MINE IS SITUATED IN THE HEADWATERS OF BRISTOL BAY, HOME TO ALASKA'S MOST VALUABLE SALMON HABITAT AND FISHERIES 7

II. ALASKAN NATIVES CRITICALLY DEPEND ON THE RENEWABLE NATURAL RESOURCES OF THE BRISTOL BAY WATERSHED TO SUSTAIN THEIR SUBSISTENCE WAY OF LIFE 11

III. THE BRISTOL BAY WATERSHED ALSO SUPPORTS ONE OF ALASKA'S MOST IMPORTANT COMMERCIAL FISHERIES 13

IV. THE COURT'S DECISION IN THIS CASE WILL HAVE BROAD RAMIFICATIONS FOR PEBBLE MINE AND BRISTOL BAY 14

CONCLUSION 17

APPENDIX

Map, Pebble Mine's Footprint 1a

Map, Relationship to Observed Fish Populations 2a

List of *Amici Curiae* 3a

TABLE OF AUTHORITIES

CASES

Page(s)

Rapanos v. *United States*, 547 U.S. 715 (2006) 2

STATUTES AND REGULATIONS

16 U.S.C. § 3111 11

Clean Water Act, 33 U.S.C.
§ 1251 7
§ 1316 2
§ 1344 ..... 3, 15
§ 1362 2

33 C.F.R. § 323.2 4

40 C.F.R.
§ 230.10 15
§ 440.104 2

47 Fed. Reg. 25,682 (June 14, 1982) 3

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S. Rep. No. 92-414 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668 7

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INTEREST OF *AMICI CURIAE*

This case concerns one particular mine—the Kensington Mine in southeast Alaska—but the impacts of the precedent set by the Court's decision will be felt by communities throughout Alaska and the rest of the Nation whose lives may be affected by other mining projects much larger than the Kensington Mine.[1] The Pebble Mine, for example, which likely will be one of the largest open-pit mines ever constructed, is being proposed for the Bristol Bay region in southwest Alaska—home to some of the world's most valuable salmon runs, spawning habitat and fisheries. *Amici* are Alaskan Native villages and corporations, commercial fishermen, and sport fishermen who depend on the unique aquatic ecosystem of Bristol Bay for their livelihood, their subsistence way of life, or, for the villages, their survival.[2] If Pebble Mine is permitted to dis-

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[1] No counsel or party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] *Amici* Nondalton Village, New Stuyahok Village, Koliganek Village Council, Curyung Tribal Council, and Ekwok Village are federally-recognized Alaska Native tribes in the Bristol Bay region who have relied for thousands of years on the region's rich salmon resources to maintain their traditional subsistence culture; Nunamta Aulukestai, "Caretakers of Our Lands," is an association of eight Bristol Bay Native Village Corporations dedicated to sustainable economic development while preserving the region's natural resources and cultural heritage; Naknek Family Fisheries is an Alaska Native-run commercial fishery located along the Naknek River, at the northern end of Bristol Bay; Alaska Independent Fishermen's Marketing Association and Bristol Bay Driftnetters'

charge its toxic wastewater and tailings directly into the lakes and headwater streams of the Bristol Bay watershed, the renewable natural resources on which *amici* depend will be severely threatened.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Section 306 of the Clean Water Act (CWA), 33 U.S.C. § 1316, requires the U.S. Environmental Protection Agency (EPA) to adopt strict effluent limitations for new sources of water pollution. In 1982, EPA promulgated a new source performance standard for ore processing mills that use the froth-flotation process,[3] one that categorically prohibits the discharge of wastewater produced by that process into waters of the United States.[4] *See* 40 C.F.R. § 440.104(b)(1) ("there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation proc-

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Association are two associations of commercial fishermen committed to protecting and promoting Bristol Bay's world class salmon fisheries, spawning habitat and other fish resources; and Renewable Resources Coalition is a non-profit 501(c)(6) corporation—a trade organization—whose members include commercial fishermen, Native Alaskans and lodge owners, and whose mission is to preserve the viability of Alaska's abundant fishing and hunting resources. The *amici* are described in greater detail in the Appendix.

[3] For a description of the froth-flotation process, see SEACC's Resp. Br. 2-3.

[4] The terms "navigable waters" and "waters of the United States" are used interchangeably in the statute to refer to all rivers, streams, lakes, wetlands, and other water bodies that are covered by the CWA. *See* 33 U.S.C. § 1362(7); *see generally Rapanos* v. *United States*, 547 U.S. 715, 723 (2006).

ess ... for the beneficiation of copper ... gold ... or molybdenum ores or any combination of these ores").

For decades, EPA and the U.S. Army Corps of Engineers (Corps) agreed that new mines using the froth-flotation method could not, consistent with EPA's zero-discharge rule, discharge wastewater directly into waters of the United States. SEACC's Resp. Br. 10-11. Mine designers employed a variety of other waste disposal techniques and engineering solutions in order to avoid discharging into waters of the United States. Indeed, as one of the bases for promulgating the rule, "EPA found that the zero-discharge standard was practicable because the majority of facilities existing at the time [had] already achieved zero discharge through recycling and evaporation processes." JA 537a; *see also* 47 Fed. Reg. 25,682, 25,697 (June 14, 1982).

2. In 2005, the Corps changed positions and, in an unprecedented decision, granted the Kensington Mine a permit under Section 404 of the CWA, 33 U.S.C. § 1344, to discharge its wastewater and tailings from the froth-flotation process directly into Lower Slate Lake, a water of the United States. The Corps reasoned that it had authority to issue the permit because the toxic pollutants discharged into the lake would have the effect of raising the bottom elevation of the lake and could therefore be treated as "fill material" over which the Corps has permitting jurisdiction.

The Corps permit for Kensington Mine was upheld by the district court, but set aside by the court of appeals, which held (correctly) that the Corps' decision to issue the permit was contrary to the plain language of the statute, and that the Section 404 permitting process could not be used to circumvent EPA's new source performance standards under Section 306. Thus, as the

court of appeals held, new mines using the froth-flotation process must comply with EPA's zero-discharge standard, and may not bypass that standard regardless of whether the solids in the wastewater discharged by the mine have sufficient size and mass to be considered "fill material."[5]

3. If the court of appeals is reversed and the Corps' interpretation of the CWA upheld, new mining projects will inevitably seek to reduce costs whenever possible by obtaining Section 404 permits from the Corps to discharge their wastewater directly into rivers, streams and lakes, rather than paying for more expensive waste disposal alternatives. The Corps' willingness to grant such permits is evidenced by the instant case, where the Corps readily approved a plan calling for the "filling" of Lower Slate Lake with toxic wastewater and tailings that are expected to wipe out most of the lake's aquatic life and all its fish. The potential ramifications of the Corps' current position, however, are even greater with respect to the proposed Pebble Mine, which dwarfs the Kensington Mine in size and scope.[6]

a. Whereas Kensington estimates that its mine will yield about 1.352 million ounces of gold mineral re-

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[5] Since 2002, the Corps has defined "fill material" as any material that "has the effect of ... [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii).

[6] Like the Kensington Mine, the Pebble Mine will use the froth-flotation mill process to segregate valuable minerals (gold, copper and molybdenum) from rock. *See* Northern Dynasty Minerals Ltd., *The Pebble Project: The Future of U.S. Mining and Metals* 3 (Oct. 2008).

serves,[7] officials estimate that the Pebble deposit contains 86.2 million ounces of gold, 73.7 billion pounds of copper and 4.15 billion pounds of molybdenum, making the proposed Pebble Mine the largest of its kind on this continent, and second worldwide only to Indonesia's Grasberg Mine.[8]

Pebble's footprint will also be far more expansive than Kensington's, covering at least 15 square miles; the open pit itself will cover more than two square miles and be at least 1,600 feet deep. Pemberton, *Jewelers Being Asked to Boycott Gold From Alaska Mine*, Anchorage Daily News, Jan. 3, 2007. Moreover, where Kensington will pipe "210,000 gallons of process wastewater, including 1,440 tons of tailings each day," for a total of "approximately 4.5 million tons of tailings [slurry]," to the bottom of Lower Slate Lake, (JA 519a), Pebble has proposed to build two tailings storage facilities that together will store 2.5 *billion* tons of tailings—which by some estimates is less than half of the mine's expected waste. Chambers, *Pebble Engineering Geology* 9-11 (2007) (concluding "that the required waste storage space for the mine will have to be approximately three times that which was indicated in the Tailings Impoundment Applications made by [Pebble's developer] to the Alaska Department of Natural Resources in 2006.").[9] The two Pebble storage facilities

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[7] *See* Coeur Alaska, Overview, http://kensingtongold.com/overview.html#economics (last visited Nov. 14, 2008).

[8] *See* Pebble Partnership, Project Information & History, http://www.pebblepartnership.com/pages/project-information/project-overview.php (last visited Nov. 14, 2008).

[9] *Available at* http://www.renewableresourcescoalition.org/ChambersSep07.pdf.

for tailings waste would require gargantuan dams, one *740 feet high* and the other *450 feet high*—giants compared to Kensington's 90-foot-high dam. *See* Northern Dynasty, *Tailings Impoundment A Initial Application Report* 14 (Sept. 5, 2006) and Northern Dynasty, *Tailing Impoundment G Initial Application Report* 14 (Sept. 5, 2006); JA 519a (size of Kensington dam).[10]

b. Pebble Mine is not only massive in scale—it is also situated in the headwaters of the world's greatest commercial salmon fishery and many internationally-renowned salmon and trout streams that attract anglers the world over. The Bristol Bay region's lakes and rivers teem with fish: five species of Pacific salmon, including one-third of the country's sockeye, and numerous species of trout, char, pike, grayling, and whitefish. The two main drainages where the Pebble deposit is situated are particularly significant: the Kvichak River and Nushagak River are home to the largest sockeye and king salmon runs, respectively, in Alaska. Bluemink, *Mining Restrictions Lifted Across Southwest Alaska*, Anchorage Daily News, Dec. 9, 2007.

Moreover, for centuries, the watershed has supported the subsistence of Alaska Natives, including the Yup'ik Eskimos, Aleuts, and Athabascan Indians. Bristol Bay is a rare natural treasure that generates profitable and sustainable industries, integral both to Alaska's economy and Alaska Natives' traditional hunting and fishing grounds.

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[10] Northern Dynasty's 2006 water rights applications and associated filings are available at http://www.dnr.state.ak.us/mlw/mining/largemine/pebble/waterapp.htm (last modified Oct. 3, 2008).

4. The Pebble Mine's unprecedented size and complexity brings unprecedented risk to Bristol Bay's vital natural renewable resources, and underscores the need to continue to enforce EPA's zero-discharge performance standard for froth-flotation ore processing mills. Should Pebble Mine be allowed to bypass that standard and obtain a Section 404 permit to discharge froth-flotation wastewater and tailings as "fill material" directly into the lakes and headwater streams of the Bristol Bay watershed, the risks posed to the unique fish and wildlife resources of Bristol Bay, and all those who depend on them, would be substantial. Indeed, using waters of the United States as dumping grounds for toxic mining waste is antithetical to the fundamental purposes of the CWA, which are to reduce and eliminate (not to create) water pollution and to clean up (not to contaminate) the nation's aquatic ecosystems. *See* 33 U.S.C. § 1251(a) (purpose of CWA is "to restore and maintain the chemical, physical, and biological integrity" of the nation's waters); *see also* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable.").

ARGUMENT

I. MANY TIMES LARGER THAN THE KENSINGTON MINE, THE PROPOSED PEBBLE MINE IS SITUATED IN THE HEADWATERS OF BRISTOL BAY, HOME TO ALASKA'S MOST VALUABLE SALMON HABITAT AND FISHERIES

1. The Pebble Mine deposits are surrounded by the headwaters of two major Bristol Bay drainages—

the Nushagak River and the Kvichak River.[11] Both drainage systems are pristine, with very few roads or extractive resource development. Duffield et al., *Revised Final Report, Economics of Wild Salmon Watersheds: Bristol Bay, Alaska*, University of Montana and Bioeconomics, Inc. 23 (Feb. 2007) (*Economics of Wild Salmon*).[12]

Directly south of the proposed mine site is Frying Pan Lake and the headwaters of the South Fork of the Koktuli River. Frying Pan Lake and the North and South Forks of the Koktuli are rich in sockeye (red salmon), coho (silver salmon), Northern Pike, Arctic grayling, sculpin, whitefish, burbot, stickleback, and Dolly Varden. McLarnon, *Protecting Water Resources, Fish Essential to Alaskan Development* 1 (2006). The Koktuli River flows into the Mulchatna River, a major tributary of the Nushagak River. The Nushagak drainage hosts a diversity of fish and wildlife, including greater numbers of four species of Pacific salmon than any other system in the region. Minard, *Effort and Catch Statistics for the Chinook Salmon*, Fishery Data Series No. 15, at 1 (1987).

Directly to the east of the Pebble deposit lies Upper Talarik Creek, "a national treasure for [Americans]

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[11] A map depicting the location of the proposed mine is provided at App. 1a. For an interactive map of the Bristol Bay region and photos of its wetlands and wildlife, see http://www.aktrekking.com/pebble/PhotoMap.html (last modified Feb. 11, 2007).

[12] *Available at* http://www.savebristolbay.org/atf/cf/%7BE729E68D-22F3-4596-9503-54FE676F2264%7D/REVISED%20Final%20Economics%20of%20Wild%20Salmon%20Ecosystems%20in%20Bristol%20Bay%202-23-2007.pdf.

and ... trout fisherman from all over the world."[13] The Upper Talarik Creek is a "catch and release special management area," and Lower Talarik Creek is a "fly-fishing only catch and release special management area," designed to ensure sustainable uses of the region's world-famous wild rainbow trout stocks.[14] Upper and Lower Talarik Creeks flow into Lake Iliamna, Alaska's largest lake, which feeds the Kvichak River. Approximately 50% of the sockeye salmon caught in Bristol Bay spawn in the lakes and rivers of the Kvichak watershed, representing 33% of the entire U.S. sockeye salmon catch.[15]

2. In 2002, Northern Dynasty Minerals, Ltd. (Northern Dynasty) began exploring 153 square miles in the Bristol Bay watershed for mineral deposits. Initially it discovered what is now called Pebble West, a 4.1 billion ton deposit of copper, gold, and molybdenum. In 2005, it discovered a deeper but richer deposit, called Pebble East. The exact extent of the deposits is not yet known, but Northern Dynasty estimates that Peb-

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[13] Press Release, Trout Unlimited, *Trout Unlimited and Allies Oppose Proposal to Remove Water From Critical Bristol Bay Salmon and Trout Rivers* (July 20, 2006) (statement of RP Van Gytenbeek, President and CEO of the International Federation of Fly Fishers), *available at* http://www.savebristolbay.org/atf/cf/%7BE729E68D-22F3-4596-9503-54FE676F2264%7D/TU_PR_Water_Withdrawals_6-20-06.pdf.

[14] Alaska Dep't of Fish & Game, Division of Sport Fish, *Southwest Alaska Rainbow Trout Management Plan* 1, 5, 8-9 (Alaska Board of Fisheries, Feb. 1990), *available at* http://www.sf.adfg.state.ak.us/region1/trout/wildtrout/rbtmgt1990bof.pdf.

[15] A map depicting observed fish habitats in relation to the proposed Pebble Mine is provided at App. 2a.

ble West has a "near-surface resource of 4.5 billion tons" and will likely be an open-pit mine. Chambers, *Pebble Engineering Geology* 11. It contains an estimated 24.7 billion pounds of copper, 42.1 million ounces of gold, and 1.35 billion pounds of molybdenum. Pebble East, with approximately 3.9 billion tons of resources, will likely be an underground bulk-tonnage mine, like Kensington. Deeper and richer than its western neighbor, it contains 49 billion pounds of copper, 45 million ounces of gold and 2.8 billion pounds of molybdenum.[16]

Like Kensington, the Pebble Mine will employ a froth-flotation mill to separate the valuable minerals from the rock. Northern Dynasty Minerals Ltd., *The Pebble Project: The Future of U.S. Mining and Metals* 3 (Oct. 2008). And, like Kensington, the Pebble Mine plans to store the waste from its froth-flotation mill underwater.[17] Overall, the mine is expected to generate up to an estimated 8.1 *billion* tons of waste, *Pebble Engineering Geology* 11, compared with Kensington's 4.5 *million* tons, (JA 522a).

In 2006, Northern Dynasty submitted applications for state water rights, which included plans for constructing two large tailings disposal facilities. One facility would have required constructing a 450-foot high

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[16] Pebble Partnership, Project Information, http://www.pebblepartnership.com/pages/project-information/project-overview.php (last visited Nov. 14, 2008).

[17] Annual Meeting, Bristol Bay Regional Advisory Council, Federal Subsistence Board, transcript 160 (Feb. 21, 2006), *available at* http://alaska.fws.gov/asm/racdetail.cfml?rac=04.

dam, the other a 740-foot high dam.[18] In October 2006, Northern Dynasty withdrew its water rights applications, presumably until the full extent of the Pebble deposit has been explored. The Pebble Partnership, a joint venture between Northern Dynasty and Anglo-American PLC formed in 2007, expects to reinitiate the permitting process for Pebble Mine in 2009.[19]

II. ALASKAN NATIVES CRITICALLY DEPEND ON THE RENEWABLE NATURAL RESOURCES OF THE BRISTOL BAY WATERSHED TO SUSTAIN THEIR SUBSISTENCE WAY OF LIFE

"Subsistence is a way of life in rural Alaska that is vital to the preservation of communities, tribal cultures, and economies." Bureau of Land Management, Anchorage Field Office, *Bay Proposed Resource Management Plan/Final Environmental Impact Statement* 3-130 to 3-140 (Dec. 2007) (*Bay RMP*) (quoting Alaska Federation of Natives).[20] In the Bristol Bay region,

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[18] *See supra* n.10. The tallest dam in the United States is currently the Oroville Dam in California, at 770 feet. Lake Oroville, About, http://www.lakeoroville.water.ca.gov/about/stats/orodam.cfm.

[19] Pebble Partnership, Project Information: Pebble Facts, http://www.pebblepartnership.com/pages/project-information/pebble-facts.php (last visited Nov. 14, 2008).

[20] *Available at* http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.81674.File.dat/bay_feis_ch3.pdf. In the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), Congress found that: "the continuation of the opportunity for subsistence uses" by rural Alaskans "is essential to Native ... and non-Native physical, economic, traditional, and social existence," 16 U.S.C. § 3111(1), and that there is a "national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska," *id.* § 3111(5).

about 70 percent of the 7,600 residents are Alaskan Natives, representing three primary indigenous cultures: Aleuts, Yup'ik Eskimos, and the Dena'ina Athabaskan Indians. *Economics of Wild Salmon* 10-11. For thousands of years they have all practiced a subsistence way of life, sharing the rivers, lakes, fish and wildlife on which they rely for sustenance and spiritual communion. *See* Branson, *Readings from Southwest Alaska* 1-3 (1998).

Today, "[s]ubsistence harvests still provide important nutritional, economic, social, and cultural benefits to most Bristol Bay households[.] Many residents continue to preserve large quantities of fish through traditional methods such as drying and smoking[.]" *Alaska Subsistence Fisheries 2003 Annual Report*, Division of Subsistence, Alaska Department of Fish & Game (Sept. 2005) (*Alaska Subsistence*).[21]

Salmon stands out as the most important subsistence food to Bay region residents. *Bay RMP* 3-24. About 2.4 million pounds of salmon—or 315 pounds per person—is harvested for subsistence uses annually, amounting to an estimated $78 million in net economic value. *Economics of Wild Salmon* 107.[22] For the resi-

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[21] *See also Bay RMP* 3-24; Dobbyn, *Old Foes Form Alliance Over Pebble*, Anchorage Daily News, Apr. 6, 2006; Salomone et al., *Fishery Management Report No. 07-22: Bristol Bay Area Annual Management Report* 3-24 (Alaska Dep't of Fish & Game Apr. 2007).

[22] Between 1983 and 2003, about 155,000 salmon, the majority of which were sockeye, were harvested annually for subsistence use. *Alaska Subsistence* 76-77, 81-87; *see also* Sands, *Overview of the Bristol Bay Salmon Fishery 2001-2003*, at 2 (Alaska Dep't of Fish & Game Dec. 2003).

dents of Nondalton, the community closest to the proposed Pebble Mine, salmon accounts for 65% of the subsistence diet, with other freshwater fish compromising another 15%. Nondalton Tribal Council, *Nondalton Long-Range Environmental Plan* 12 (Oct. 6, 2006). Besides salmon, subsistence users depend on Arctic grayling, burbot, Dolly Varden, lake trout, Northern pike, Rainbow smelt, Rainbow trout, whitefish, herring, halibut, Pacific cod, and sculpin. *Alaska Subsistence* 78, 82.

Subsistence is more than sustenance; fishing and hunting are interwoven with traditional social and spiritual values that together constitute the core of Alaska Native culture. *See generally Alaska Native Subsistence & Fishing Rights: Hearing Before the S. Comm. on Indian Affairs*, 2002 WL 652795 (Apr. 17, 2002) (statement of Rosita Worl, Ph.D., Director, Sealaska Corp.).

III. The Bristol Bay Watershed Also Supports One Of Alaska's Most Important Commercial Fisheries

In the late 1800's, the Bristol Bay area's salmon were discovered by the commercial market and the area "became the center of the most productive fisheries in the world." Branson, *Readings from Southwest Alaska* 8. It now produces about 39 million sockeye annually, more than any other region in the world. Fair, *Critical Elements of Kvichak River Sockeye Salmon Management*, 10 Alaska Fishery Res. Bull. 95 (2003). The region also boasts an abundance of Chinook, or king salmon, char, pike, trout, grayling, and whitefish. *Id.*

The harvesting and processing of Bristol Bay fish generates nearly $320 million a year and provides over 16,000 jobs in the summertime. *Economics of Wild*

Salmon 15, 18. By 2001, about 54,000 people (including non-residents) earned all or part of their annual incomes from fishing in the region, and now an estimated 5,490 full-time equivalent jobs are supported by the region's wild salmon runs alone. *Id.* at 92. Thousands of residents and visitors annually enjoy the fresh-water sport fishing offered by the region's streams, rivers, and lakes.[23] Indeed, "[t]he ... mainstays of the economy in [the Bristol Bay watershed] are all wilderness-compatible and sustainable in the long run: subsistence use, commercial fishing, and wilderness sportfishing." *Id.* at 23.

IV. The Court's Decision In This Case Will Have Broad Ramifications For Pebble Mine and Bristol Bay

As noted above, the Pebble Partnership plans to begin the permitting process for Pebble Mine in 2009. The Court's ruling in the instant case will set a precedent that will determine which of two possible legal regimes will govern that process: EPA's new source performance standard under Section 306 of the CWA, which imposes a zero-discharge limitation for process wastewater produced by froth-flotation mills; or the

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[23] Sport fishermen spend approximately $58 million a year to experience the world class trout and salmon streams of the Bristol Bay watershed. *Economics of Wild Salmon* 50. King salmon and rainbow trout are the most frequently targeted species for sport fishermen. *Id.* at 46. In 2005, the region boasted 65,000 recreational visitors; nearly 1,000 resident employees hosted anglers and hunters from across the globe. *See* Renewable Resources Coalition, *The Risk From the Pebble Mine*, http://www.renewableresourcescoalition.org/risk_to_sport_fishing.htm (last visited Nov. 14, 2008).

Corps' Section 404 permitting process for discharges of "fill material."

Under the new source performance standard, which had long been the applicable legal regime until the Corps' recent change in position regarding the Kensington Mine, Pebble Mine would be prohibited from discharging any process wastewater, including tailings, directly into any waters of the United States in the Bristol Bay watershed. Like other mines, Pebble would have to undertake the expense of engineering waste disposal options that avoid discharges of wastewater into any waters of the United States.

By contrast, under the Corps' Section 404 permitting regime, Pebble could apply for a permit to discharge toxic wastewater from its ore mill into waters of the United States as "fill material," so long as the wastewater contains suspended solids sufficient in size and mass to have the effect of raising the bottom elevation of the lake, stream, or other receiving water body. There would be no legal restriction on the waters Pebble could propose to use for that purpose, which could range from small headwater streams and lakes to Lake Iliamna, the largest lake in Alaska. The Corps would evaluate any such proposal under its Section 404(b)(1) guidelines, which call for it to consider a range of factors, including the potential harm posed by the discharge and the practicability and cost of any available alternatives. *See* 33 U.S.C. § 1344(b)(1); 40 C.F.R. § 230.10(a)(2).

Thus, if applicable, the Section 404 regime would open the door to the Corps allowing Pebble Mine to use waters of the United States, in effect, as tailings disposal sites, just as the Corps did with respect to the Kensington Mine. The risks posed to aquatic life and

water quality in the Bristol Bay watershed would potentially be severe. Copper, cyanide, and other by-products of Pebble's froth-flotation process would threaten fish and other aquatic life in any lakes and streams into which the wastewater was discharged, and any other downstream waters the contaminants might reach.[24] Moreover, wastewater discharged into natural water bodies also carries the threat of groundwater contamination. *See* Chambers, Coumans & Woody Amicus Br. 24 ("Groundwater contamination is also potentially a larger problem with lake disposal, since lakes are hydrologically connected to groundwater[.]"). In addition, the eradication of headwater streams and lakes in the Bristol Bay region, including in the vicinity of Pebble Mine (*see* App. 2a (map)), would itself likely result in loss of salmon spawning habitat, among other effects. And any damage to the salmon fisheries and other renewable natural resources of the Bristol Bay ecosystem would in turn endanger the subsistence way of life of Alaska Native villages and the sustainable commercial and sport fishing industry that so many citizens of Alaska rely upon.

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[24] Salmon and other organisms comprising freshwater food chains are very sensitive to heavy metals, trace elements, and other contaminants found in mine wastes. Lemly, *Mining in Northern Canada*, 29 Ecotoxicology & Envtl. Safety 229, 230-234 (1994). Of particular concern here, copper concentrations just above the amount required for growth and reproduction can be highly toxic to aquatic species and cause irreversible harm. Hodson et al., *Toxicity of Copper to Aquatic Biota*, in *Copper in the Environment: Health Effects* Opt. II, 307, 307-308 (Jerome O. Nriagu ed., 1979). In addition, cyanide, another toxic chemical used in the froth-flotation process, is also highly toxic to fish at low concentrations. *See generally* Chambers, Coumans & Woody Amicus Br. 15.

In sum, it would be antithetical to the CWA to allow mines, such as the Kensington and Pebble Mines, to bypass EPA's zero-discharge rule for process wastewater by deeming the wastewater to be "fill material." As illustrated by the potential effects of the proposed Pebble Mine for Bristol Bay, the risks of such wastewater discharges to aquatic resources are unacceptable, and the use of waters of the United Sates as toxic mining waste disposal sites simply cannot be squared with the text or purposes of the CWA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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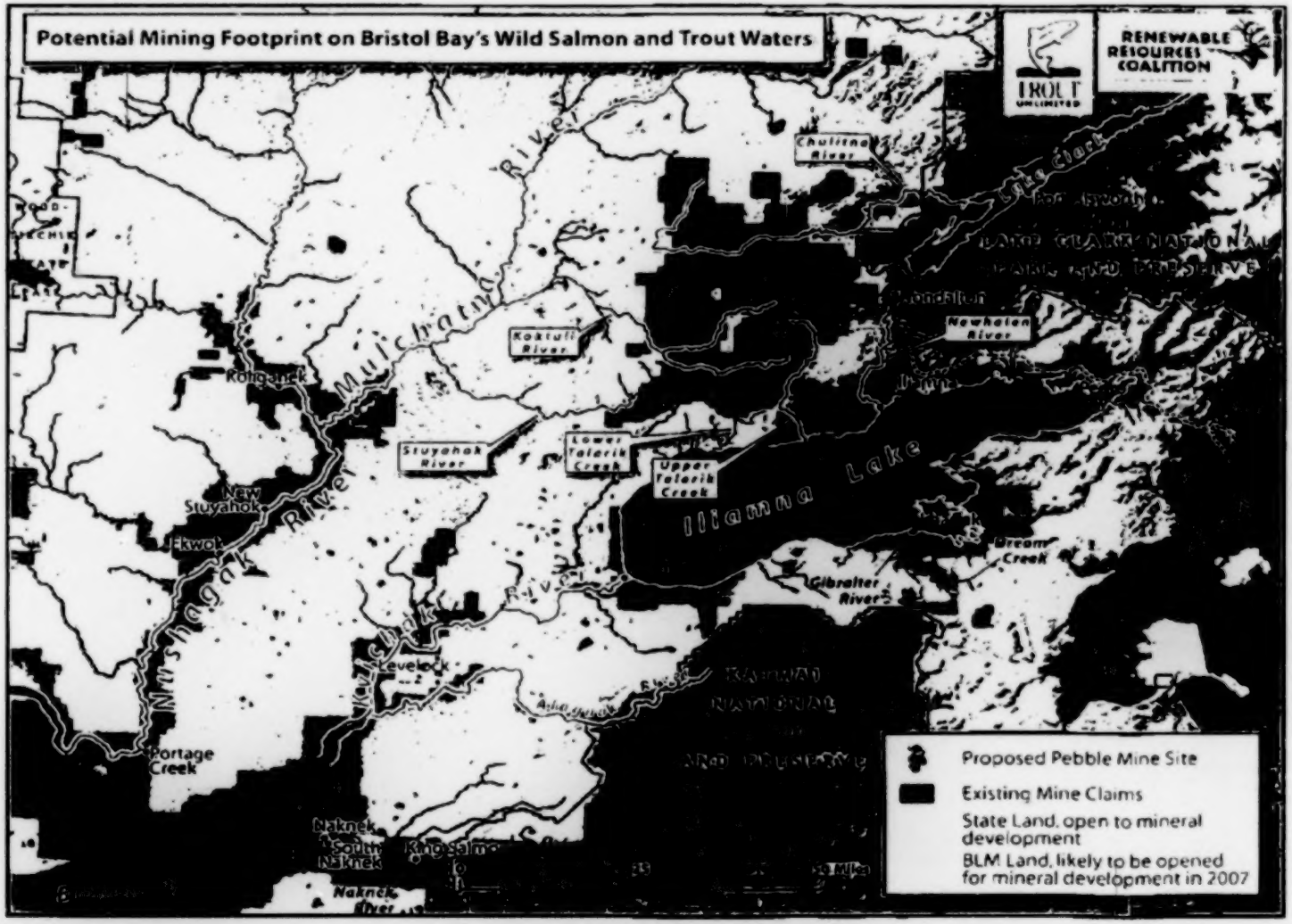
NOVEMBER 2008

APPENDIX

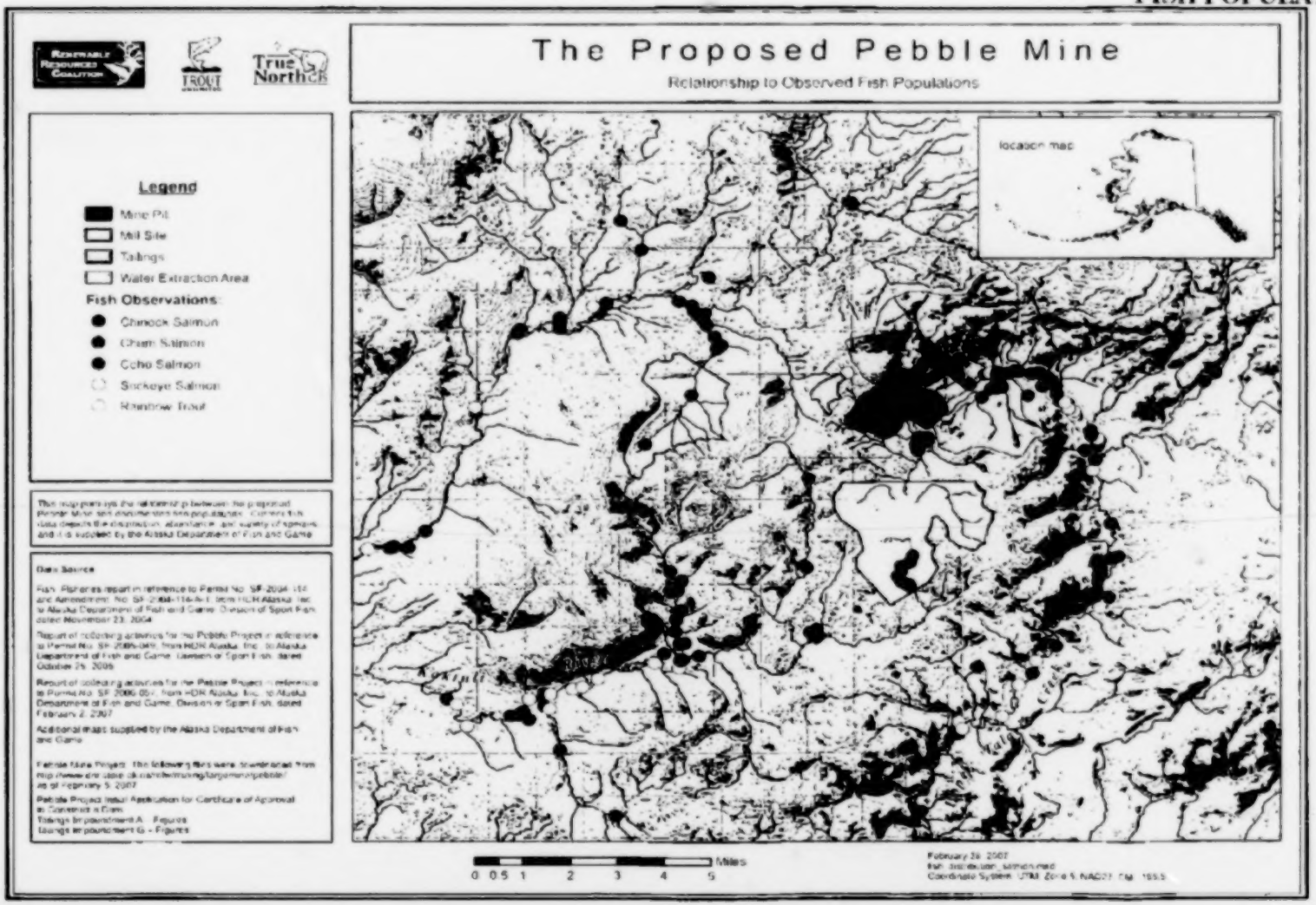
APPENDIX

PEBBLE MINES'S FOOTPRINT



APPENDIX

RELATIONSHIP TO OBSERVED FISH POPULATIONS



LIST OF *AMICI CURIAE*

Nunamta Aulukestai, "Caretakers of Our Lands," is an association of eight Bristol Bay Native Village Corporations, representing hundreds of Alaska Natives and dedicated to responsible land use planning and management. The associated Villages are Ekwok, Koliganek, New Stuyahok, Saguyak, Aleknagik, Togiak, Manokotak and Curyung. Nunamta Aulukestai aims to diversify the economy of the Bristol Bay region while sustaining its natural resources and cultural heritage. It provides a forum for cooperation in matters concerning the management and protection of natural resources for subsistence uses and sustainable economic and community development.

Nunamta Aulukestai's culture depends on clean water and land. For thousands of years the Native people of Bristol Bay have subsisted from the land, relying on berries, salmon, caribou, moose, beluga whales, walrus, seals, ptarmigan, ducks, geese and many plants. To this day, many of those represented by Nunamta Aulukestai still practice a subsistence way of life. Thomas Tilden expressed it simply: "we are people of the salmon; we live off it, we make our life off of it."[1] Bobby Andrew noted before the State House of Representatives Fisheries Committee that:

> Water, as the source of life, is fundamental for the health of the area's renewable resources,

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[1] HB 134—Protection of Salmon Spawning Water, Fisheries Committee Minutes, Sept. 24, 2007, at 7:25 pm, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00308&end_line=01636&session=25&comm=FSH&date=20070924&time=1644.

> and the residents who depend upon them.... The subsistence lifestyle has sustained the people of the region, who consider themselves "rich in many ways."[2]

The Nondalton Tribal Council is the governing body of the Nondalton Village Tribe. The Nondalton Village Tribe is federally recognized, and its village of approximately 200 people—about 90% of whom are Alaska Native—is located 15 miles from the Pebble deposit, along the west shore of Six Mile Lake, between Lake Clark and Iliamna Lake. Nondalton's residents are Northern Athabascans belonging to the Dena'ina tribes of the Cook Inlet region who rely heavily on subsistence hunting and fishing. The village lies in an area integral to the Kvichak watershed, a highly productive spawning ground for sockeye and other species of Pacific salmon. Harvests of salmon are extremely important to residents' diets, accounting for 65% of the subsistence diet, with other freshwater fish comprising another 15%.

The New Stuyahok Traditional Council is the governing body of the New Stuyahok Village Tribe. The New Stuyahok Village Tribe is federally recognized, and its village of approximately 480 people is located along the Nushagak River in Southwest Alaska. Ancestors of tribal members have lived in southwest Alaska for thousands of years, and tribal members still rely heavily on the area's plentiful fish, wildlife, and

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[2] HB 134—Protection of Salmon Spawning Water, Fisheries Committee Minutes, Sept. 26, 2007, at 11:50 am, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00365&end_line=02787&session=25&comm=FSH&date=20070926&time=0900.

vegetation as the basis of their diet and culture. New Stuyahok is the first village downstream from the Pebble Mine site on the Nushagak.

The Koliganek Village Council is the governing body of the Koliganek Village Tribe. The Koliganek Village Tribe is federally recognized, and its village of approximately 187 people is located along the Nushagak River, 65 miles from Bristol Bay. Koliganek is a Yup'ik Eskimo village where subsistence activities are an important part of life. Frances Nelson, a resident of Koliganek, described her Village's subsistence way of life:

> We, as a Native people, have lived in harmony with the land, fish and wildlife. We are the traditional stewards and caretakers of this land. Our connection to the land, fish and wildlife is an important part of our identity as Yup'ik people. For us to remain on this land, we need subsistence.[3]

The Ekwok Tribal Council is the governing body of the Ekwok Village Tribe. The Ekwok Village Tribe is federally recognized, and its village of approximately 130 people is also located along the Nushagak River, 12 miles downriver from New Stuyahok. Ekwok, which means "end of the bluff," is the oldest continuously occupied Yup'ik Eskimo village on the river. During the 1800's, the settlement was used in the spring and summer as a fish camp, and in the fall as a base for berry-picking. By 1923, it was the largest settlement along

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[3] Nelson, *No, Pebble Mine Isn't My Neighbor: Proposed Project Would Benefit Outside Interests to the Detriment of Native People*, Juneau Empire (July 14, 2006).

the river. The entire population depends on subsistence activities for various food sources including salmon, pike, moose, caribou, duck and berries.

The Curyung Tribal Council is the governing body of the Curyung Village Tribe. The Curyung Village Tribe is federally recognized, and the tribal community of approximately 1400 people is located in Dillingham, at the mouth of the Nushagak River, in Southwest Alaska.[4] Traditionally an Alaskan Native area, Dillingham now has a highly mixed population of non-Natives, Eskimos, Aleuts and Athabascans. Curyung tribal members still depend upon subsistence activities using traditional methods that have been passed on for generations. Participating in subsistence activities is crucial to the survival of their community due to limited employment opportunities, stifled wages, and the high cost of living.

Naknek Family Fisheries is the most recently-formed fish processor and the only fisherman, Native-owned seafood processing company in Naknek. The village of Naknek is located along the Naknek River, at the northeastern end of Bristol Bay. The Naknek economy is predominately based on salmon fishing and processing.

Izetta Chambers, a Naknek member who has participated in the Bristol Bay fishery since the age of 11,

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[4] *See* ACDIS, Dillingham, http://www.commerce.state.ak.us/dca/commdb/CIS.cfm?Comm_Boro_Name=Dillingham (last visited, Nov. 10, 2008); *see also* The Pebble Partnership, Regional Map, http://www.pebblepartnership.com/images/RegionalMap.jpg (last visited Nov. 14, 2008).

noted that "[w]e ... have an economy and it's based on fishing, and it's been so for hundreds of years."[5]

Alaska Independent Fishermen's Marketing Association (AIFMA) has ongoing goals to protect and promote the Bristol Bay salmon resource and fishermen's livelihoods. AIFMA, comprised of and funded by fishermen memberships, has been steadfast in its commitment to fishermen and the salmon resource of the Bristol Bay region since 1966.

In response to a bill before the state legislature to protect the Bristol Bay drainages for salmon, AIFMA commented:

> In recent years the salmon industry and the State of Alaska have invested a great deal in Alaska's Wild Salmon and this investment is beginning to pay dividends throughout the state. Thousands of existing Alaskan jobs depend upon the purity of Bristol Bay's renewable and sustainable salmon fishery and the integrity of its spawning habitat. These jobs depend on protection of the pristine habitat of the Bristol Bay watershed.[6]

The mission of the Bristol Bay Driftnetters' Association (BBDA) is to enhance the Bristol Bay Drift Net Fishery by advocating for the viability of Bristol Bay's fish resources and promoting awareness of policy issues

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[5] Bauman, *Alaska Wild Salmon Finds Advocate in Oregon's New Season's Market*, Alaska Journal of Commerce (July 22, 2007).

[6] Letter from David Harsila, President, Alaska Independent Fishermen's Marketing Association, to Rep. Paul Seaton (Feb. 19, 2007), http://www.aifma.org/spawning_habitat_article.html.

that affect the well-being and businesses of the Drift Net Fishermen who use this renewable resource. BBDA has diligently worked to develop wild Bristol Bay salmon's image, which would potentially be affected by the proposed Pebble Mine. Nick Lee of the Bristol Bay Driftnetters' Association noted the importance of the marketing of the Bristol Bay Salmon when providing testimony on a state bill that would protect the Bristol Bay waters for salmon:

> Small amounts of copper, sulfuric acid, and cyanide can be detrimental to our fish stocks[.] Wild Alaska Salmon is sold as a health supplement. If there are any issues with contaminated water in Bristol Bay's streams, lakes or rivers it will be detrimental to the marketing of all Alaskan Salmon.[7]

The Renewable Resources Coalition (RRC) is an Alaskan non-profit 501(c)(6) corporation which unites a diverse membership of commercial fishermen, Alaska Natives, and sportfish lodge owners. Founded in 2005, RRC's mission is to preserve and protect the ongoing viability of Alaska's abundant fishing and hunting resources and the lands and waters they need to survive. RRC has a deep and abiding interest in protecting Bristol Bay sport fisheries. Two of RRC's six board members are sport fishing lodge owners in the Bristol Bay region. A third built and owns the only cabin on the Koktuli River in the Bristol Bay drainage, where he

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[7] HB 134—Protection of Salmon Spawning Water, Fisheries Committee Minutes, Feb. 28, 2007, at 10:34 am, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00169&end_line=01460&session=25&comm=FSH&date=20070228&time=0838.

has fished and hunted for over 25 years, and a fourth is the author of a fishing book and a fly-fishing teacher at the University of Alaska.

AMICUS CURIAE BRIEF

166

Nos. 07-984 and 07-990

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SUPREME COURT, U.S.

In the

Supreme Court of the United States

COEUR ALASKA, INC., *Petitioner,*
v.

SOUTHEAST ALASKA
CONSERVATION COUNCIL, et al., *Respondents.*

STATE OF ALASKA., *Petitioner,*
v.

SOUTHEAST ALASKA CONSERVATION
COUNCIL, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ALASKA MINERS ASSOCIATION, AND ALASKA FOREST ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for discharges of "fill material" provided that the discharges comply with that section's water-quality requirements jointly developed by the Corps of Engineers and the Environmental Protection Agency. 33 U.S.C. § 1344(a), (b)(1). By regulation, the Corps of Engineers and EPA have jointly defined "fill material" generally as any material that has the net effect of raising the bottom elevation of a water of the United States, including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)—(f); 40 C.F.R. § 232.2.

In this case, the Ninth Circuit held that the Corps of Engineers lacked authority under Section 404 to issue a permit for the discharge of fill material whenever the discharge implicates an effluent restriction promulgated by EPA as part of its permit program under Section 402 of the Act. On that basis, Ninth Circuit invalidated a Section 404 discharge permit issued by the Corps of Engineers to Petitioner Coeur Alaska, Inc.

The question presented is whether the Ninth Circuit erred in rejecting the expert agencies' conclusion, based on their joint interpretation of the Act, that effluent restrictions promulgated as part of the Section 402 permit program do not apply to discharges of fill material permitted under Section 404.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE SECTION 404 AND SECTION 402 PERMIT PROGRAMS ARE DISTINCT AND OFFER A BIFURCATED STATUTORY SCHEME 4

II. THE TAILINGS RESULTING FROM PETITIONER COEUR ALASKA'S MINING OPERATIONS SHOULD BE REGULATED UNDER SECTION 404 OF THE CLEAN WATER ACT 9

A. Petitioner Coeur Alaska's Kensington Mining Operations Will Result in a Stationary Tailings Impoundment 9

B. Congress Intended Stationary Discharges to Be Regulated Under Section 404, Not Section 402 11

III. THIS COURT'S DECISION WILL HAVE A SIGNIFICANT IMPACT ON THE VIABILITY OF THE MINING INDUSTRY IN ALASKA AND THE WESTERN UNITED STATES 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 525 (W.D. La. June 9, 1979) *aff'd*, 715 F.2d 897 (5th Cir. 1983) 9

City of Baton Rouge v. United States Envtl. Prot. Agency, 620 F.2d 478 (5th Cir. 1980) 6

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 1

Kentuckians for Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 5, 8, 11

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 1

Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) 6

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 1

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) . . . 1

Rapanos v. United States, 547 U.S. 715 (2006) 1, 4, 7-8, 11-12

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TABLE OF AUTHORITIES—Continued

Page

Federal Statutes

33 U.S.C. §§ 1251-1387 4
§ 1311 4
§ 1311(a) 5-6, 8
§ 1316 4
§ 1319 18
§ 1342 . . . . . 4, 8
§ 1342(a) 6-7, 11
§ 1344 . . . . . 4, 6-7
§ 1344(a) 11
§ 1344(a), (b)(1) i
§ 1344(f)(1) 8
§ 1365 18

Federal Regulations

33 C.F.R. § 323.2(e)—(f) i
40 C.F.R. § 232.2 i
§ 440.144 11

Rules of Court

Supreme Court Civ. R. 37.3 1
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Page

Miscellaneous

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TABLE OF AUTHORITIES—Continued

Page

Szumigala, D. J. & Hughes, R. A.,
Alaska's Mineral Industry 2006: A Summary (2007) 15

United States Dep't of Commerce,
Bureau of Economic Analysis,
Gross Domestic Product by State (2007) 15

United States Dep't of Labor,
Bureau of Labor Statistics,
Alaska Economy at a Glance (2007) 15

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), the Alaska Miners Association, and the Alaska Forest Association submit this amicus curiae brief in support of Petitioners State of Alaska and Coeur Alaska, Inc.[1] The parties have consented to the filing of this amicus curiae brief.[2]

Founded thirty-five years ago, PLF is the largest and most experienced public interest legal foundation of its kind. PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF participated as lead counsel in previous cases, including *Rapanos v. United States*, 547 U.S. 715 (2006), involving the administration of the Clean Water Act. And PLF also participated as amicus or lead counsel in several cases concerning the Takings Clause of the Constitution. *See e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] Pursuant to Rule 37.3(a), amici curiae state that letters indicating their intent to file this brief were sent to all counsel of record on August 25, 2008. The consent of the Solicitor General is filed herewith. All other parties have issued blanket consents to the filing of amicus briefs in support of either party or neither party.

The Alaska Miners Association (AMA) is a nonprofit membership organization established in 1939 to represent the mining industry. The AMA is composed of more than 1100 individual prospectors, geologists and engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. The AMA's members explore for and produce gold, silver, platinum, diamonds, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, etc. AMA members live and work throughout the State of Alaska, and if the decision of the Ninth Circuit Court of Appeals in *Southeast Alaska Conservation Council v. United States Corps of Engineers* is allowed to stand, it will have extreme adverse impacts on AMA members and their ability to operate.

The Alaska Forest Association (AFA) is a nonprofit industry trade association established in 1957. The AFA's membership includes businesses and individuals in the Alaskan timber industry. The AFA's mission is to advance the restoration, promotion, and maintenance of a healthy, viable forest products industry which contributes to the economic and ecological health of Alaska's forests and communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision invalidated the United States Army Corps of Engineers' (Corps) and the United States Environmental Protection Agency's (EPA) interpretation of the Clean Water Act (CWA) that the discharge of fill material into an impoundment falls within the Corps' exclusive permitting authority under Section 404. In place of this longstanding interpretation, the Ninth Circuit erroneously held the

CWA to require that the discharge of fill material must also satisfy effluent limitations and performance standards separately promulgated by the EPA pursuant to Section 402 of the Act. In so holding, the Ninth Circuit not only misinterpreted the distinct statutory programs of Section 404 and Section 402, but it also effectively prohibited one of the most common and environmentally sound methods for the disposal of mining waste. Reversing the Ninth Circuit is necessary to confirm the proper permitting authority for the discharge of fill material and to allow the mining industry to continue operations, to the benefit of the state and national economy.

This case is of vital importance to Alaska's mining industry. Historically, mining has been a cornerstone of the Alaskan economy, and today the industry is delivering a broad range of economic benefits to Alaskans and their local communities. Mining is a significant source of revenue and infrastructure development for state and local governments and Native corporations. The livelihoods of many Alaskans and their families depend on mining. Amici urge the Court to reverse the Ninth Circuit's decision and set forth guidelines that will permit mining operations to continue to impound tailings subject to Section 404 permitting.

ARGUMENT

I

THE SECTION 404 AND SECTION 402 PERMIT PROGRAMS ARE DISTINCT AND OFFER A BIFURCATED STATUTORY SCHEME

The CWA, 33 U.S.C. §§ 1251-1387, establishes two regulatory permitting programs for discharges into navigable waters of the United States. Section 404 of the Act requires a permit for the discharge of dredged or fill material into navigable waters and is administered by the Corps, with cooperation and regulatory assistance from the EPA. 33 U.S.C. § 1344. Section 402, also known as the National Pollutant Discharge Elimination System (NPDES) program, is administered by the EPA and requires a permit for the discharge of all pollutants other than dredged or fill material. 33 U.S.C. § 1342. Under Section 402, the discharge of pollutants is subject to the effluent limitations and performance standards (collectively effluent limitations) prescribed pursuant to Sections 301 and 306 of the Act. 33 U.S.C. § 1311 (Section 301 effluent limitations); 33 U.S.C. § 1316 (Section 306 new source performance standards).

The Section 404 and Section 402 schemes are separate permitting programs, *Rapanos v. United States*, 547 U.S. at 744-45 (plurality opinion), such that discharges into the navigable waters of the United States are to be regulated under either Section 404 or Section 402, but not both. As the Fourth Circuit noted, the 404/402 "fill-effluent distinction" demonstrates that "the Clean Water Act clearly intended to divide

functions between the Corps and the EPA based on the type of discharge involved." *Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003).

Although the Corps granted Petitioner a permit to discharge wastewater containing tailings into a small lake under Section 404, *see Southeast Alaska Conservation Council v. United States Army Corps of Engineers*, 486 F.3d 638, 640-41 (9th Cir. 2007) (*SEACC*), and the Ninth Circuit admitted that Petitioner Coeur Alaska's froth-flotation mill operation "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake," *id.* at 644, the Ninth Circuit nevertheless invalidated the permit based on effluent limitations promulgated under Sections 301 and 306 of the CWA, holding that "[n]either § 301 nor § 306 contains an exception for discharges that would otherwise qualify for regulation under § 404." *Id.* at 646.

This holding, however, ignores the critical distinction between Sections 404 and 402. While purporting to "maintain [the] existing approach to regulating pollutants under either section 402 or 404 of the CWA," *id.* at 651, the Ninth Circuit instead misread the general prohibition of 33 U.S.C. § 1311(a) (Section 301) to eviscerate the function of Section 404: "The use of 'and' as a connector [in 33 U.S.C. § 1311(a)], instead of 'or,' indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404." *Id.* at 646. However, this Court has held that the use of "and" between statutory requirements does not

automatically make such requirements conjunctive. *See, e.g.*, *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 248-49 (1985) (reversing Court of Appeals' conclusion that the two clauses of Section 17 of the Pueblo Lands Act were both required because they were "joined by the conjunctive 'and'").

Instead of an all-inclusive prohibition, Section 301 contemplates a system whereby pollutant discharges would be generally prohibited "[e]xcept as in compliance" with various provisions of the CWA, including Section 404. 33 U.S.C. § 1311(a). In other words, Section 301 instructs potential dischargers to look to other provisions in order to determine whether the general prohibition of Section 301 is applicable. *See City of Baton Rouge v. United States Envtl. Prot. Agency*, 620 F.2d 478, 479 & n.1 (5th Cir. 1980) (noting that Section 301 "proscribes the discharge of pollutants except in compliance with NPDES permits issued under section [402]" and that Section 301 "*has several other exceptions*," including Section 404) (emphasis added).

The distinct nature of Section 404—in that permits under Section 404 absolve the need for compliance under Sections 301, 402, and the other provisions listed in 301(a)—is confirmed by Section 402's requirement that 402 permits "meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343," 33 U.S.C. § 1342(a), a list that is not present in Section 404. Since Section 404 gives the Corps authority to permit "discharge[s] of dredged or fill material into the navigable waters," 33 U.S.C. § 1344, and does not require compliance with the provisions listed in Section 402, discharges permitted under the former provision are exempt from

the general prohibition of Section 301. *See United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 393 (6th Cir. 1984) (noting that Section 301 of the Clean Water Act states that "except as permitted under certain exceptions, 'the discharge of any pollutant by any person shall be unlawful.' . . . One of the express exceptions to this rule is contained in section 404 . . . which authorizes the Corps to issue permits for the disposal of dredged or fill materials into 'navigable waters'" (citations omitted)), *rev'd on other grounds*, 474 U.S. 121 (1985), *and Riverside Bayview Homes, Inc.*, 474 U.S. at 123 (noting that under the Clean Water Act "any discharge of dredged or fill materials into 'navigable waters' . . . is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404, 33 U.S.C. § 1344"). *See also* Robert J. Pierce, *Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act* 34 (Apr. 2003), *available at* http://www.wetlandtraining.com/pdfs/tpreljscwa.pdf (last visited Sept. 19, 2008) ("Congress recognized the difference in the nature of discharges of dredged and fill material when it specifically carved-out Section 404 and named the Secretary of the Army to administer it."), *cited in Rapanos*, 547 U.S. at 745 n.11 (plurality opinion). Congress did not impose the requirements that are explicitly stated in Section 402 because:

> In contrast to the pollutants normally covered by the permitting requirement of § 1342(a), "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an "addition . . . to navigable

> waters" when deposited in upstream isolated wetlands.

Rapanos, 547 U.S. at 744-45 (plurality opinion).

To suggest that "the lack of any explicit exception to § 301 and § 306 within § 404, and the lack of an exception for process wastewater from mines, is strong evidence that Congress did not intend one," *SEACC*, 486 F.3d at 648, is to fail to fully understand the 404/402 "fill-effluent distinction" of the CWA. *See Kentuckians for the Commonwealth*, 317 F.3d at 447. The Fourth Circuit correctly articulated this dichotomy in *Kentuckians for the Commonwealth*, noting that "[f]ill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself. For this reason, the section 404 permitting process focuses on different considerations than the section 402 permitting program." *Id* at 446.

While Section 404 provides for certain instances where discharges of dredged or fill material do not require a permit, it does not provide explicit exceptions to the Section 402 permit program, as that would render the 404/402 fill-effluent distinction irrelevant. For example, the list of activities in Section 404(f)(1) is not a list of those activities that are exempt from Section 301 and Section 402 regulations, but instead is only "a short list of exceptions to the broad range of discharges covered by the term 'fill material' in § 404(a)." *Id.* at 442 (analyzing Section 404(f)(1), 33 U.S.C. § 1344(f)(1), which provides that the discharge of dredged or fill material from or for certain activities "is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions

under section 1317)"). *See also Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525, 531 (W.D. La. June 9, 1979) ("[A] permit is not required for all discharges of dredged or fill material. [Section] 404(f)(1) exempts certain activities from the [Section 404] permit program."), *aff'd*, 715 F.2d 897, 925-26 (5th Cir. 1983). *But see SEACC*, 486 F.3d at 648 (suggesting that because "§ 404(f) exempts discharges of dredged or fill material from certain activities from regulation under § 301(a), § 402, and § 404," and because "[m]ining is not listed as an exempt activity [in § 404(f)]," tailings discharges from froth-flotation mills are not exempt from Section 301 and Section 306 effluent limitations).

In short, Sections 404 and 402 offer distinct permitting programs—regulation of discharges under one takes the discharge beyond the scope of regulation under the other.

II

THE TAILINGS RESULTING FROM PETITIONER COEUR ALASKA'S MINING OPERATIONS SHOULD BE REGULATED UNDER SECTION 404 OF THE CLEAN WATER ACT

A. Petitioner Coeur Alaska's Kensington Mining Operations Will Result in a Stationary Tailings Impoundment

Within any gold mine, rock containing valuable gold mineral (ore) is excavated from its in situ location with the use of drills and explosives. The broken ore is delivered outside the mine to a mill where it is crushed and then ground to the consistency of fine sand.

Through the addition of water, this sand combines to make a slurry which is then pumped to separation tanks known as flotation cells. Organic reagents similar to soap are added to the slurry and air is injected into the flotation cells to create bubbles. The reagents are designed such that the specks of gold sulfide are attracted and adhere to the bubbles. The bubbles are skimmed off the top of the tank, the majority of the water removed and reclaimed, while the recovered product of fine sand and gold sulfide make up the final concentrate. This concentrate is then dried, bagged and loaded into containers to be shipped off the mine site for subsequent smelting elsewhere. All of the crushing, grinding, and flotation occurs inside the mill building which has no discharge to the environment.[3]

Once the gold sulfide is removed, the material that remains is essentially sand, which makes up the majority of the material originally processed through the mill. The sand (now called tailings) is pumped as a slurry (processed water and sand) to the tailings impoundment. At the impoundment, the sand is distributed through a series of pipes to create a relatively even layer across the bottom of the facility. Throughout the life of the mine, the impoundment serves as a treatment facility. Natural runoff from the undisturbed areas above the impoundment is diverted around the facility. This ensures that this water does not intermingle with the tailings water, and that the tailings settle as rapidly as possible. Any water

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[3] For a further description of the milling process, please see Brief for Petitioner Coeur Alaska, Inc. at 5-8 and Forest Service, Kensington Gold Project Final Supplemental Environmental Impact Statement at 2-21 and 2-22 (Dec. 2004) (contained within the Joint Appendix at 159a, 189a-191a).

leaving the impoundment is treated to meet all applicable water quality standards, and then flows through a pipe to enter the stream below the tailings impoundment.

The amount of treated water which can be discharged from the impoundment is prescribed by the United States Environmental Protection Agency regulations. *See* 40 C.F.R. § 440.144. It is equal to the net precipitation minus the evaporation which occurs over the impoundment in a year. This ensures that the "zero discharge" definition in the regulation is achieved.

B. Congress Intended Stationary Discharges to Be Regulated Under Section 404, Not Section 402

The critical characteristic that determines whether a discharge will be subject to Section 404's or Section 402's permit program is whether the materials that are discharged will remain stationary in a navigable water or instead will disperse downstream and elsewhere, resulting in something more than a localized effect. "In contrast to the pollutants normally covered by the permitting requirement of § 1342(a), 'dredged or fill material,' which is typically deposited for the sole purpose of staying put, does not normally wash downstream." *Rapanos*, 547 U.S. at 744-45 (plurality opinion) (citing, in part, 33 U.S.C. § 1344(a)). *See also Kentuckians for the Commonwealth*, 317 F.3d at 446 ("Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water itself.") Further,

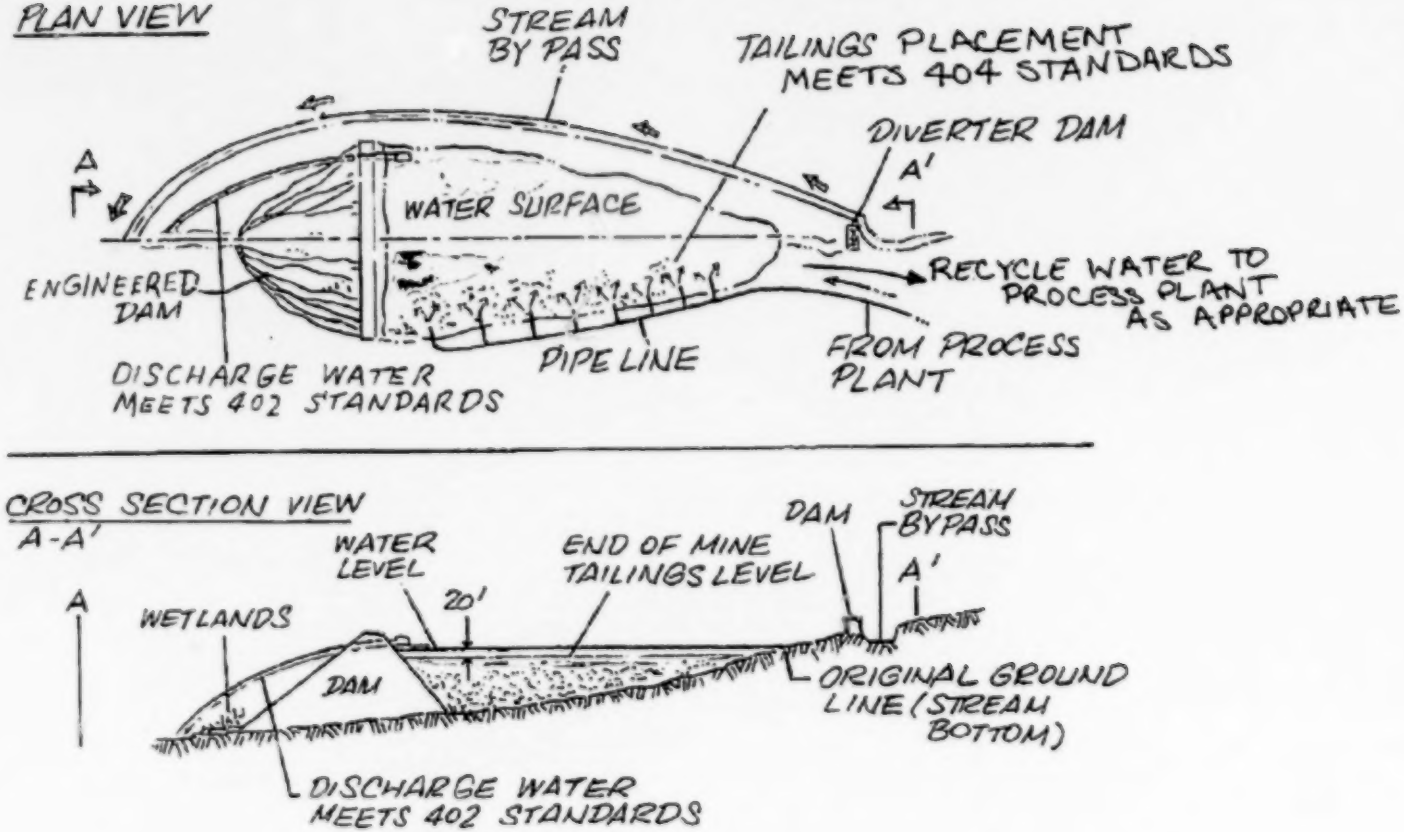
> [I]n many locations throughout the nation, land use controls, a responsibility of state, not federal government, typically have requirements to minimize erosion and sediment runoff during and after construction as well as requiring the control of both quantity and quality of runoff from constructed facilities. Thus, the likelihood that a discharge of fill material will result in the addition of a pollutant to navigable waters located at any appreciable distance from the discharge is highly unlikely.

Pierce at 35.

Even though "[t]he idea that the discharge of dredged or fill material into isolated waters . . . will pollute navigable waters located at any appreciable distance from them lacks credibility," *id.* at 34, to the extent that fill material "could travel downstream through waterways adjacent to a wetland . . . this is a factual possibility that the Corps' experts can . . . assess," *Rapanos*, 547 U.S. at 774 (Kennedy, J., concurring), as the Corps did in this case when it determined that Petitioner Coeur Alaska's discharge would result in the disposal of "fill material." *See SEACC*, 486 F.3d at 640-41.

Permitting the tailings discharges in this case under Section 404 is consistent with the stationary nature of fill material. Tailings are the leftover material from the froth-flotation process that extracts the actual gold from the ore-bearing rock from the mine. The 90-foot high, 500-foot long dam to be constructed by Petitioner Coeur Alaska, *see id.* at 642, evidences an intent to ensure that the tailings "will remain in place in perpetuity." Pierce at 35 ("Citizens

who typically have the need to discharge fill material do so with the intent that the material will remain in place in perpetuity."). Consistent with the definition of fill material, the tailings will not wash downstream, but instead will settle at the bottom of Lower Slate Lake. *See SEACC*, 486 F.3d at 642. The propriety of subjecting this stationary material to only a Section 404 permitting process is further demonstrated by the Corps' issuance of a Section 402 permit for the water that will be displaced and dispersed when the tailings enter the dammed lake, as illustrated by the diagram below.



VALLEY USAGE FOR TAILINGS PLACEMENT

Indeed, while discharges for which a discharger will have little or no control are regulated by Section 402, discharges that remain stationary should be permitted solely under Section 404. Petitioner Coeur Alaska's discharge of tailings in this case requires only a Section 404 permit.

III

THIS COURT'S DECISION WILL HAVE A SIGNIFICANT IMPACT ON THE VIABILITY OF THE MINING INDUSTRY IN ALASKA AND THE WESTERN UNITED STATES

The importance of the mining industry to Alaska cannot be overstated. Historically, mining has been a cornerstone of Alaska's economy, and the mining industry continues to be one of the most important growth segments of Alaska's economy (currently the only segment of Alaska's economy that has reported double-digit growth). The mining industry accounts for approximately 8% of Alaska's overall economy. *See* State of Alaska Petition for Writ of Certiorari at 29-30 (citing United States Dep't of Labor, Bureau of Labor Statistics, *Alaska Economy at a Glance* (2007); United States Dep't of Commerce, Bureau of Economic Analysis, *Gross Domestic Product by State* (2007); D. J. Szumigala & R. A. Hughes, *Alaska's Mineral Industry 2006: A Summary* 1-2 (2007)). According to the most recent study conducted for the AMA, the mining industry contributed nearly $4 billion to Alaska's economy in 2007, including $275 million in exploration, $274 million in development, and $3.4 billion in gross mineral production value. Alaska Miners Association, *The Economic Impacts of Alaska's*

Mining Industry, (2007).[4] The mining industry is also an extremely important source of revenue for state and local governments. In 2007, the mining industry paid $14 million to local government, and $175 million to state government. *Id.*; *see also* McDowell Group, Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry*, (Feb. 2006).[5] The Alaskan mining industry also provides a major source of revenue for Native Alaskan corporations. In 2007, the mining industry paid $170 million to Native corporations, of which $125 million was earmarked for redistribution among other Alaska Native regional and village corporations. Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry* (2007).

In 2007, the mining industry provided 5,500 direct and indirect mining jobs in Alaska, contributing $340 million in direct and indirect payroll. *Id.* These are some of the highest paying jobs in Alaska, with an average annual wage of $80,000—90% higher than the state average for all sectors of the economy. *Id.* And, where located, mining operations provide some of the largest private sector employment opportunities. *See id.*

A 2006 study of the mining industry reported that the industry was poised for ongoing growth; however, affirmance of the Ninth Circuit's decision would have a devastating impact on the mining industry and economy of Alaska—not to mention impacts felt throughout the nation. *See* McDowell Group, *The*

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[4] *Available at* www.alaskaminers.org/mcd07sum.pdf (last visited Sept. 19, 2008).

[5] *Available at* www.alaskaminers.org/mcd06rpt.pdf (last visited Sept. 19, 2008).

Economic Impacts of Alaska's Mining Industry, *supra*, at 1. It is beyond reasonable dispute that mining operations in Alaska will come into contact with wetlands, which comprise nearly 50% of the state. *See* Mark Squillace, *From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation*, 40 U. Mich. J.L. Reform 799, 809 (2007). And even before the Ninth Circuit's decision, obtaining a permit for the disposal of tailings was considered one of the "greatest obstacle[s]" to developing a mine project in Alaska. *See* Alaska Minerals Commission, *Report of the Alaska Minerals Commission* (2006), at 1.[6]

> The permitting of the disposal of mine tailings into waters of the United States including wetlands is critical to the mining industry in Alaska. Many mine operations can only be built in valley areas through which streams run and wetland are present. In many instances disposing of tailings in a "drystack" on uplands is not practicable.

Id. at 13. Subjecting the tailings process to the Section 402 permitting scheme would make this process even more difficult (if not impossible) by leaving no practicable solution which would permit the discharge of slurry into an impoundment.[7]

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[6] *Available at* www.dced.state.ak.us/oed/minerals/pub/web06.pdf (last visited Sept. 19, 2008).

[7] One of the most significant distinctions between the permitting programs under Sections 404 and 402 is that the Section 404(b)(1) guidelines contain "practicability" provisions. This means that, under Section 404, the Corps has the latitude and flexibility to evaluate and issue Section 404 wetlands permits in a manner that

(continued...)

While mine exploration and development expenditures have steadily increased over the past decade, affirming the vacatur of Petitioner Coeur Alaska's Section 404 permit could have the effect of jeopardizing Alaska's ability to attract investment and growth of the mining industry. *See* McDowell Group, *The Economic Impacts of Alaska's Mining Industry*, *supra*, at 9-13. In addition, if this Court declares the Corps' issuance of the Section 404 permit to Petitioner to be invalid, producing mines that use tailings impoundments will have to cease or delay their operations until they can be brought into compliance with the new regulatory scheme. *See* 33 U.S.C. §§ 1319, 1365. For example, Alaska's Red Dog mine is operating under a Section 404 permit that was issued in 1985 for the placement of lead and zinc mine tailings into an impoundment located in wetlands. Brief for the National Mining Association as Amicus Curiae Supporting Petitions for Rehearing en Banc at 10. *Southeast Alaska Conservation Council v. United States Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2007) (No. 06-35679).[8] If upheld, the Ninth Circuit's decision could be used to frustrate this essential mining operation. The impact would be devastating, as the Red Dog mine is the world's largest zinc concentrate producer, providing $9 million (of the total $14 million) in payment to local governments, and nearly all of the $170 million in revenue to Native

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[7] (...continued)
is based on cost, technological feasibility, sound science, and the minimization of environmental impact. By contrast, the EPA's Section 402 "zero discharge" performance standard is absolute.

[8] Similarly, the Fort Knox gold mine is operating under a Section 404 permit to discharge tailings into an impoundment located in a wetland. *Id.* at 11.

Alaska corporations. Alaska Miners Association, *The Economic Impacts of Alaska's Mining Industry*, (2007). The potential impact to Alaska's mining industry and its demonstrated ability to bring economic development to diverse, remote areas of Alaska lends question to the Ninth Circuit's overturning of 35 years of agency practice of regulating fill material solely under Section 404.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed.

DATED: September, 2008.

Respectfully submitted,

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AMICUS CURIAE BRIEF

107

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In the Supreme Court of the United States

COEUR ALASKA, INC., *Petitioner*,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, *Petitioner*,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC.AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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47 38

TABLE OF CONTENTS

STATEMENT OF INTEREST 1

PRELIMINARY STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE SUCCESS OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT DEPENDS ON NATURAL RESOURCE DEVELOPMENT 6

A. Congress intended that ANCSA allow Alaska Natives to reap economic benefits through natural resource development on Native lands 6

B. ANCSA's requirement that Native Corporations share with one another their resource development-generated revenue ensures that all ANCSA shareholders benefit from mining 13

II. MINING IS ONE OF ALASKA'S FASTEST-GROWING INDUSTRIES, CREATING THOUSANDS OF JOBS FOR ALASKANS AND GENERATING HUNDREDS OF MILLIONS OF DOLLARS IN REVENUE FOR THE STATE 14

III. RESPONSIBLE RESOURCE DEVELOPMENT IS CRUCIAL TO FULFILLING THE PURPOSES OF ANCSA, BUT THE NINTH CIRCUIT'S DECISION THREATENS THE ECONOMIC PROSPERITY MINING HAS BROUGHT TO ANCSA CORPORATIONS IN RECENT YEARS 17

A. Limited economic opportunities for Alaska Natives have mired rural Native communities in poverty and associated social problems 17

B. Alaska's growing mining industry plays an increasingly crucial role in fulfilling ANCSA's economic purposes and alleviating poverty amongst Alaska Natives 20

1. Mining's positive impact on rural Alaska 20

2. Increased mining in rural Alaska benefits ANCSA corporations and their Native shareholders 20

C. The Ninth Circuit's decision threatens to impede economically beneficial mining projects and harm Native Corporations and their shareholders 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Aleut Corp. v. Arctic Slope Regional Corp.,
421 F. Supp. 862 (D. Alaska 1976) 7, 8

Amoco Production Co. v. Village of Gambell,
480 U.S. 531(1987) 1

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410, 414 (1945) 17

Chugach Natives, Inc. v. Doyon,Ltd.,
588 F.2d 723 (9th Cir. 1978): 7, 8

City of Angoon v. Marsh,
749 F.2d 1413 (9th Cir. 1984) 16

City of St. Paul v. Evans,
344 F.3d 1029 (9th Cir. 2003) 6

Cook Inlet Beluga Whale v. Daley,
156 F. Supp. 2d 16 (D. D.C. 2001) 1

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569 F.2d 491 (9th Cir. 1978) 5, 6

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39 F.3d 991(9th Cir. 1994). 6

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154 F.3d 1062 (9th Cir. 1998) 6

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96 F.3d 1222 (9th Cir. 1996) 1

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486 F.3d 638 (9th Cir. 2007) 2, 7, 15

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853 F.2d 727 (9th Cir. 1990) 6

Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.,
517 F. Supp. 1255, (D. Alaska 1981) 5, 8

United States v. Atlantic-Richfield Co.,
435 F. Supp. 1009 (D. Alaska 1980) 4

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43 U.S.C. § 1601 ..... 4, 12

43 U.S.C. § 1602 5

43 U.S.C. § 1606 ..... passim

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Envtl.Protection Agency et al, Alaska Wetlands Initiative Summary Report (1994)..... 3, 16

Gigi Berardi, Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages, 38 Nat. Resources J. 86 (1998) 11, 15

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Lee Huskey, Alaska's Village Economies, 24 J. Land Resources & Envt'l L. 435 (2004) 11, 14, 15

NANA Regional Corporation, Red Dog Mine ... 13, 14

Rachel King, Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska, 77 Or. L. Rev. 1 (1998) 11

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U.S. Census Bureau, State Population Estimates – Characteristics: Race and Hispanic Origin 6

U.S. Dept. of Health & Human Serv., Overcoming Challenges to Business and Economic Development in Indian Country (2004) 6

U.S. Gov't Accountability Office, Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight (Apr. 2006) 6, 17

Legislative History

132 Cong. Rec. S8171 (June 23, 1986) 8
H.R. 92-523 (Sept. 28, 1971) 7
Senate Rep. No. 92-405 (1971). 10

STATEMENT OF INTEREST[1]

The Resource Development Council for Alaska, Inc. ("RDC") is an Alaska-based, non-profit, membership-funded trade organization comprised of businesses and individuals from all resource sectors (oil and gas, mining, fishing, timber, and tourism), as well as support sectors, labor unions, and local governments. Of particular importance to the discussion below, all thirteen Alaska Native Regional Corporations created through the Alaska Native Claims Settlement Act are members of the RDC. Through the RDC, these interests work together to promote and support responsible development of Alaska's natural resources.

As part of its mission, the RDC works with federal, state, and local government officials to provide information and analysis on public policy issues of concern to its membership. The RDC's efforts in this regard include providing input on implementation of the Clean Water Act, such as

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[1] This amicus brief is filed with the consent of the parties. With the exception of the United States, all petitioners and respondents have filed letters with the Clerk of the Court consenting to the filing of amicus briefs pursuant to the Court's Rule 37.3(a). Respondent United States' letter of consent is being filed with the Clerk of the Court together with this brief. Under Rule 37.6, the amicus submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than amicus paid for or made a monetary contribution toward the preparation and submission of this brief.

submitting comments on federal agency jurisdiction following this Court's decision in *Rapanos v. United States*.

The RDC also regularly participates as an *amicus* in federal court litigation centering on resource development issues affecting Alaska. *E.g.*, *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987); *Schultz v. Dept. of Army*, 96 F.3d 1222 (9th Cir. 1996); *Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16 (D. D.C. 2001).

Due to its potentially serious impact on the responsible development of Alaska's resources, and especially because that impact will have a disproportionately large effect on the state's Native community, the issue presented in this appeal is of great importance to the RDC and its membership.

In *Rapanos v. United States* this Court recognized that the Corps of Engineers and the EPA have classified the "waters of the United States" to comprise half of the land area of Alaska.[2] In many cases these waters are the only practical location where mine tailings can be disposed of in an environmentally-sound manner. But following the Ninth Circuit's flawed interpretation of the Clean Water Act in *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, all of these waters – regardless of their suitability for use as disposal sites

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[2] *Rapanos*, 547 U.S. 715, 722, 126 S. Ct. 2208, 2215, 165 L. Ed. 2d 159 (2006) (plurality opinion) (Scalia, J.).

– are off-limits for mines using processes for which effluent limitations have been adopted.

The Ninth Circuit's decision is at odds with the language and purpose of the Clean Water Act, and promises to shackle responsible resource development throughout Alaska. The Clean Water Act should be read according to its plain language, which calls for separate permitting schemes for the disposal of mine tailings (*i.e.*, "fill" under Section 404), and the discharge of pollutants (Section 402). The Ninth Circuit's erroneous conflation of these two separate permitting schemes threatens the feasibility of future development of Alaska's resource base.

Accordingly, the RDC participates in this appeal for the purpose of assisting the Court in understanding the practical implications of the Ninth Circuit's decision on the Alaska economy – particularly the substantial harm to Alaska Native corporations (the largest private landowners in the state) and their shareholders (essentially co-extensive with Alaska's Native community) that could result if this Court affirms the decision.

PRELIMINARY STATEMENT

Given the parties' briefing already before the Court, the RDC's amicus brief will not address the substantive legal issues at play in this appeal regarding the intent of the Clean Water Act – other than to agree with the petitioners and federal respondents that the Ninth Circuit erred when it

declined to defer to the implementing agencies' interpretation of the Act, and instead interpreted the Clean Water Act in a manner contrary to the Act's plain language.

In addition, other *amicus* briefs submitted in support of the petitioner discuss the impact the Ninth Circuit's decision will have on the mining industry generally and those who depend on the jobs and revenue mining generates in Alaska. The RDC's brief will thus focus specifically on the consequences to Alaska's Native Corporations and the Alaska Native community, as well as to Alaska generally, if this Court affirms the Ninth Circuit.

SUMMARY OF ARGUMENT

Alaska's economy depends on responsible development of its vast natural resources. Mining is a critical part of that development. Alaska's mining industry is growing rapidly, with exploration and development occurring throughout the state. Mining provides revenue and employment opportunities that benefit the entire state. But as the Kensington mine (the subject of this appeal) illustrates, the Ninth Circuit's decision threatens to dismantle this critical economic engine.

This threat holds true for Native Corporations established through the Alaska Native Claims Settlement Act ("ANCSA"). Congress enacted ANCSA in order to provide a means by which Alaska Natives could derive economic benefits from the resources around them. Native Corporations are the

largest private landowners in Alaska, with title to tens of millions of acres of selected land throughout the state. Mining offers Native corporations a real opportunity to generate jobs and other economic benefits for their Native shareholders, and fulfill the implicit promise Congress made to Alaska Natives when it offered them resource-rich lands in exchange for extinguishment of their aboriginal claims.

A growing number of Alaska Native Corporations are fulfilling ANCSA's economic goals by partnering with the mining industry in resource development projects around the state. These partnerships are helping to make ANCSA's economic promise to Alaska Natives become a reality.

But the Ninth Circuit's decision promises to derail this trend. As this Court itself recognized in *Rapanos*, 547 U.S. at 722, 126 S. Ct. at 2215, the EPA and Corps of Engineers have declared nearly "half of Alaska" (approximately 175 million acres – bigger than Texas) as waters or wetlands subject to regulation under the Clean Water Act.[3] Given this abundance, it is virtually impossible to develop large-scale mining projects in Alaska that do not affect wetlands or other waters that are subject to Clean Water Act regulation. Wetlands are especially pervasive in rural western and northern Alaska, where resource development offers the best realistic

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[3] Amicus Brief of Council of Alaska Producers in support of Petitioner at 4-5 (citing Envt'l Protection Agency et al, *Alaska Wetlands Initiative Summary Report* at 2 (1994). *See also* U.S. Army Corps of Engineers/Alaska District: Regulatory Program, http://www.poa.usace.army.mil/reg (last visited Sept. 12, 2008).

chance for private-sector investment and real economic growth.

The Ninth Circuit's decision requiring that a Section 404 fill permit be contingent on compliance with Sections 301, 306 and 402 of the Clean Water Act has created a broad prohibition against utilizing Alaska's waters when any of a number of conventional mining processes are used, as mining inherently produces tailings. This decision unduly ties the hands of the federal permitting and land management agencies charged with implementing the Act, and overturns by judicial fiat the longstanding role of these agencies in devising workable mine tailings disposal plans. The court of appeals' decision promises to hobble resource development on ANCSA lands, to the economic detriment of Native Corporations and their Alaska Native shareholders.

ARGUMENT

I. THE SUCCESS OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT DEPENDS ON NATURAL RESOURCE DEVELOPMENT

A. Congress intended that ANCSA allow Alaska Natives to reap economic benefits through natural resource development on Native lands

Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, in 1971.[4] Through ANCSA, Congress intended to resolve pending aboriginal land and hunting and fishing claims in Alaska by extinguishing those claims in return for granting native organizations fee title to selected lands.[5]

ANCSA also gave Alaska Natives a direct stake in Alaska's economic development.[6] Commentators have observed that "ANCSA was intended to be a development tool as much as a claims settlement, a way for one of America's poorest minority groups to escape from poverty on a self-determined path",[7] and that ANCSA "was drafted from the beginning with profitable business activities and resource developments in mind, so it can be viewed as a unique response to the interaction of native peoples and mineral development."[8]

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[4] Pub. L. 92-203, 85 Stat. 688 (Dec. 18, 1971) & ANCSA Amendments of 1987 (Act of Feb. 3, 1988, Pub. L. No. 100-241, 101 Stat. 1788).

[5] 43 U.S.C. § 1601(a). *See generally United States v. Atlantic-Richfield Co.*, 435 F. Supp. 1009, 1014-1020 (D. Alaska 1980), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888, 101 S. Ct. 243, 66 L. Ed. 2d 113 (1980) (describing in detail the history leading up to passage of ANCSA and the purposes and effect of the Act).

[6] 43 U.S.C. § 1601(b). *See also* ANCSA Amendments of 1987.

[7] Stephen Colt, Article: *Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations*, 25 J. Land Resources & Envtl. Law 155, 157 (2005) (footnotes & citations omitted).

[8] James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 Rocky Mtn. Min. L. Inst. 12 at 4 (2007).

Working in cooperation with Alaska Natives,[9] Congress crafted an innovative way to settle aboriginal land claims and to allow a means for Natives to become real stakeholders in Alaska's economy and the development of its resources: the Alaska Native Corporation.[10]

ANCSA divided Alaska into twelve geographic regions. Alaska Natives then organized a "Regional Corporation" for each region.[11] Each region also contains numerous smaller "Village Corporations" (about 225 in all).[12] ANCSA required every corporation to be organized under Alaska law.[13] (In addition, a thirteenth Regional Corporation was

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[9] ANCSA defines the term "Native" to mean a United States citizen who is one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood. 43 U.S.C. § 1602(b).

[10] 43 U.S.C. § 1606. *See* Colt, *supra*, 25 J. Land Resources & Envtl. L. at 157-159.

[11] 43 U.S.C. § 1606(a) & (d). *See Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.*, 517 F. Supp. 1255, 1256 (D. Alaska 1981).

[12] 43 U.S.C. § 1610(b). *See* Colt, *supra*, 25 J. Land Resources & Envt'l. L. at 155 (map showing all regional and Village Corporations). Villages eligible to form corporations under ANCSA "were defined as communities, neither modern nor urban, composed of at least twenty-five Natives, with Natives representing at least fifty percent of the village population." *Ukpeagvik Inupiat Corp.*, 517 F. Supp. at 1256 (citing 43 U.S.C. § 1610(b)(2)).

[13] 43 U.S.C. §§ 1606-1607. *See generally Doyon, Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491, 493 (9th Cir. 1978).

subsequently formed for non-resident Alaska Natives.[14])

Following incorporation, all eligible Alaska Natives within a particular region who were alive on December 18, 1971 (the date of the Act) received 100 shares of stock.[15] In addition, Alaska Natives who also lived in an eligible village became village stockholders. (Natives residing outside an eligible village became at-large Regional Corporation stockholders.[16]) Finally, following Congressional amendments to ANCSA in 1991, the Act authorizes Regional Corporations to issue additional shares to so-called "after borns" – Alaska Natives born after December 18, 1971 and their descendents.[17] Virtually every Alaska Native is now an ANCSA shareholder.[18]

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[14] 43 U.S.C. § 1606(c). *See* 13th Regional Corporation website at http://www.the13thregion.com (last visited Sept. 11, 2008).

[15] 43 U.S.C. § 1606(g).

[16] *See Ukpeagvik Inupiat Corp.*, 517 F. Supp. at 1257, n. 5 (citing 43 U.S.C. § 1606(g)). Four "urban corporations" in four specified areas (Sitka, Kenai, Juneau, and Kodiak) were also formed. 43 U.S.C. § 1613(h)(3). "Native group" corporations, consisting of communities of less than 25 but more than 3 Natives who comprise a majority of the residents of the locale, are also eligible to form corporations. 43 U.S.C. § 1613(h)(2).

[17] 43 U.S.C. § 1606(g) & (h). *See* Linxwiler, *supra*, 53 Rocky Mtn. Min. L. Inst. at 12-20.

[18] Alaska's estimated population in 2007 for those identifying themselves as "Alaska Native or American Indian" stood at 103,690. U.S. Census Bureau, *State Population Estimates – Characteristics: Race and Hispanic Origin*, http://www.census.gov/popest/states/asrh/SC-EST2007-04.html/ (then follow "Estimates of the Population by Race and Hispanic Origin for the United States: July 1, 2007" hyperlink). In Fiscal Year 2004, the thirteen Regional Corporations had about

Through this complex legislative scheme, Regional and Village Corporations effectuate ANCSA and serve the settlement beneficiaries and corporate shareholders – Alaska Natives.[19]

Key to the viability of the Native Corporations was the right granted to each to select and own land in fee simple. Through ANCSA, the twelve regional Native Corporations were able to select for conveyance from the United States a total of 44 million acres of land.[20] (The thirteenth regional corporation established for non-Alaska resident Natives does not own land.[21]) Additionally, the Regional Corporations own the subsurface rights (including mineral rights) to 22 million acres of Village Corporation lands.[22] The land grant to the twelve regional corporations made Native Corporations the largest private landowners in Alaska.[23]

102,000 shareholders. U.S. Gov't Accountability Office, *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* 81 (GAO 06-399, Apr. 2006), *available at* http://www.gao.gov/new.items/d06399.pdf (last visited Sept. 18, 2008).

[19] 43 U.S.C. § 1606(g); 43 U.S.C. § 1607(c). *See Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 995 (9th Cir. 1994).

[20] 43 U.S.C. § 1611. *See also Doyon, Ltd.*, 214 F.3d at 1311 (explaining ANCSA land grants).

[21] 43 U.S.C. §§ 1606 (c), 1611.

[22] *See* 43 U.S.C. § 1613(f); *Lesnoi, Inc. v. Stratman*, 154 F.3d 1062 (9th Cir. 1998); *See Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727, 730 (9th Cir. 1990)

[23] U.S. Dept. of Health & Human Serv., *Overcoming Challenges to Business and Economic Development in Indian Country* at 43

Congress intended for ANCSA land to provide economic benefits to the Regional and Village Corporations and their shareholders.[24] As the Ninth Circuit recounted in *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723 (1978):

> The land grant under ANCSA was a generous one, clearly intended to exceed the subsistence needs of Natives and to give them a significant economic stake in the future development of Alaska. As stated by the House Committee on Interior and Insular Affairs: The acreage occupied by villages and needed for normal village expansion is less than 1,000,000 acres. While some of the remaining 39,000,000 acres may be selected by the Natives because of its subsistence use, most of it will be selected for its economic potential.[25]

Congress intended for mineral development to be one of the primary means for realizing the Native lands' economic potential. The House Committee on Interior and Insular Affairs stated that the Regional Corporations were to:

(2004), *available at* http://aspe.hhs.gov/hsp/wtw-grants-eval98/tribal-dev04/report.pdf (last visited Sept. 17, 2008).

[24] *See City of St. Paul v. Evans*, 344 F.3d 1029, 1031-1032 (9th Cir. 2003).

[25] *Id.* at 731 (citing H.R. Rep. No. 92-523 (92d Cong., 1st Sess. 5, reprinted in U.S. Code Cong. & Admin. News pp. 2192, 2195) (1971) (emphasis added).

> ... each share equally in the mineral developments. The mineral deposits ... [are] included as part of the total economic settlement. We feel it is very important for these mineral deposits to be available to all of the natives to further their economic future.[26]

Accordingly, the Regional Corporations used mineral potential as a prime criterion in choosing their land selections.[27]

ANCSA's statutory provisions and its legislative history make clear that resource development is one of the primary means by which Congress intended to enable Native Corporations to bring economic benefits to their shareholders. But the Ninth Circuit's flawed interpretation of the Clean Water Act in *SEACC v. Corps of Engineers* threatens to stymie the economic development purposes of ANCSA, to the detriment of all Native Corporations and of the Native community generally.

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[26] H.R. 92-523 (Sept. 28, 1971).

[27] *Cf. Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F. Supp. 862, 866 (D. Alaska 1976).

B. ANCSA's requirement that Native Corporations share with one another their resource development-generated revenue ensures that all ANCSA shareholders benefit from mining

When Congress enacted ANCSA, it recognized that the subsurface mineral wealth and economic potential of the lands selected by the Native Corporations would not be uniformly distributed. So ANCSA contains a natural resource revenue-sharing provision: Section 7(i).[28]

ANCSA Section 7(i) is "'intended to achieve a rough equality in assets among all the Natives. . . . (The section) insures that all of the Natives will benefit in roughly equal proportions from these assets.'"[29] As recited by the Ninth Circuit, under Section 7(i):

> 70% of all revenues received by each Regional Corporation from timber and subsurface estate resources must be

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[28] 43 U.S.C. § 1606(i) (ANCSA § 7(i)). *See generally*, Linxwiler, *supra*, 53 Rocky Mtn. Min. L. Inst. At 12-25–29.

[29] *Chugach Natives, Inc.*, 588 F.2d at 732 (quoting *Aleut Corp.*, 421 F. Supp. at 867). *See also Ukpeagvik Inupiat Corp.*, 517 F. Supp. at 1257 ("Section 1606(i) ... achieves a rough equality by allowing for the fact that some regions are resource-poor, while others possess a wealth of natural resources"); 132 Cong. Rec. S8171 (June 23, 1986) (Senator Stevens, in describing section 7(i) distributions, stating that Regional Corporations "are merely acting as agents for the other Native Corporations so far as these revenues are concerned").

> divided among all 12 Regional Corporations in proportion to the number of Natives enrolled in each region. At least 50% of the revenues so received must be redistributed among the Village Corporations.[30]

Section 7(i) mandates that when mineral or timber resources are developed on Native Corporation land, all 102,000 ANCSA Native shareholders[31] benefit. As of 2007, more than $760 million has been redistributed amongst the Regional Corporations under Section 7(i).[32] In 2007 alone, $125 million in mining industry payments to Native Corporations were redistributed amongst Regional and Village Corporations.[33]

II. MINING IS ONE OF ALASKA'S FASTEST-GROWING INDUSTRIES, CREATING THOUSANDS OF JOBS FOR ALASKANS AND GENERATING HUNDREDS OF MILLIONS OF DOLLARS IN REVENUE FOR THE STATE

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[30] *Chugach Natives, Inc.*, 588 F.2d at 724 (footnote omitted) (citing ANCSA § 7(j) (43 U.S.C. § 1606(j)) (footnote omitted).

[31] U.S. Gov't Accountability Office, *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* 81.

[32] Ass'n of ANCSA Presidents and CEOs, *Wooch Yuayi: Woven Together* at 14 (2007).

[33] *Amicus Curiae* Brief of Pacific Legal Foundation in support of Petitioners at 16.

Mining is one of the fastest-growing industries in Alaska. The value of the state's mining industry is now well over $1 billion annually, and growing rapidly.[34] The Alaska Minerals Commission reports that revenue to the State of Alaska from the minerals industry increased an astounding 292 percent between 2006 and 2007,[35] totaling $151.6 million in Fiscal Year 2007.

As of 2006, thirty-three hard-rock or coal mines were in the operational, exploration or development stage – all in remote, rural parts of Alaska.[36] These mines have so far generated thousands of jobs throughout the state. The Alaska Division of Geological & Geophysical Survey reported that the mineral mining industry employed an estimated 3,523 full-time workers in 2006 – an increase of 702 jobs from 2005.[37] And the number of mineral mining jobs in the state increased 23 percent

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[34] Alaska Dept. of Commerce, Community, & Economic Development, Office of Economic Development: Minerals Development, http://www.commerce.state.ak.us/oed/minerals/mining.htm (last visited Sept. 12, 2008).

[35] Alaska Minerals Comm'n, *Report of the 2008 Alaska Minerals Comm'n* at iv, *available at* http://www.commerce.state.ak.us/oed/minerals/pub/mineralsreport2008_web.pdf (last visited Sept. 12, 2008).

[36] Alaska Div. of Geological & Geophysical Surveys, *Alaska's Mineral Industry 2006: Special Report 61* at 5 (2006), *available at* http://www.dggs.dnr.state.ak.us/pubs/pubs?reqtype=citation&ID=15860 (last visited Sept. 16, 2008).

[37] *Id* at 2.

between 2000 and 2007.[38] Additionally, the mining support activities industry provided an average of 7,606 jobs during 2006.[39]

Just as important, Alaska mining jobs pay top wages. The Alaska Department of Labor & Workforce Development reported that the average monthly income for non-oil and gas related mining occupations in 2007 was $6,884 – or approximately $82,608 per year – more than double the average annual salary for all occupations in Alaska during the same year.[40] Workers in the mining support industry earned even more, with an average monthly income of $7,183 in 2006.[41] These facts show how the mining industry can improve economic conditions for Alaska generally and ANCSA shareholders in particular.

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[38] Alaska Dept. of Labor & Workforce Development, *Alaska Economic Trends* at 8 (Sept. 2008), *available at* http://labor.alaska.gov/trends/sep08.pdf#art1 (last visited Sept. 16, 2008).

[39] Alaska Div. of Geological & Geophysical Surveys, *supra*, at 2.

[40] The Alaska Dept. of Labor & Workforce Development, *Preliminary 2007 Quarterly Census of Employment & Wages* at 1, *available at* http://www.labor.state.ak.us/research/ee/ee07.pdf (last visited Sept. 12, 2008).

[41] Alaska Div. of Geological & Geophysical Surveys, *supra* at 2 (2006).

III. RESPONSIBLE RESOURCE DEVELOPMENT IS CRUCIAL TO FULFILLING THE PURPOSES OF ANCSA, BUT THE NINTH CIRCUIT'S DECISION THREATENS THE ECONOMIC PROSPERITY MINING HAS BROUGHT TO ANCSA CORPORATIONS IN RECENT YEARS

A. Limited economic opportunities for Alaska Natives have mired rural Native communities in poverty and associated social problems

Generating revenue through natural resource development on Native Corporation lands in Alaska – and the sharing of the wealth created under Section 7(i) – is critical to fulfilling ANCSA's purpose of creating economic opportunities for Alaska Natives.

When it enacted ANCSA, Congress saw a way to end the poverty that gripped many Alaska Native communites.[42] As the Senate Committee on Interior and Insular Affairs reported while deliberating the Act:

> [Alaska Natives] are among the most disadvantaged citizens of the United States in terms

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[42] *See* Colt, *supra*, 25 J. Land Resources & Envtl. L. at 157-158 & n. 13.

> of income, employment, educational attainment, life expectancy, health, nutrition, housing, and every important indicator of social welfare.[43]

Today, many rural Alaskans still are hard put to make ends meet. Alaska Natives comprise 82 percent of the population in rural parts of the state.[44] Poverty and unemployment rates amongst rural Alaskans – particularly rural Alaska Natives – still far outpace those of their urban Alaska counterparts.[45] Per-capita income of Alaska Natives is about half that of non-Natives.[46]

The geography of rural Native Alaska is at the root of these statistics. The small size and remoteness of rural Alaska villages limit their economic potential; nearly all of these communities are accessible only by plane, or in some cases, by boat in the warmer months.[47] The lack of arable land and

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[43] Senate Rep. No. 92-405, at 72 (1971).

[44] Alaska Native Policy Center, *Our Choices, Our Future: The Status of Alaska Natives* 2004 at 5, *available at* http://www.firstalaskans.org/documents_fai/ANPCa.pdf (last visited Sept. 17, 2008).

[45] *See id.* at 86-89; Lee Huskey, *Alaska's Village Economies*, 24 J. Land Resources & Envt'l L. 435, 437, 440-43 (2004) Alaska Native Policy Center, *Our Choices, Our Future: The Status of Alaska Natives* at 63.

[46] J.A. 503a, ¶ 20.

[47] Huskey, *supra*, 24 J. Land Resources & Envt'l L. at 437 (2004).

other resources necessary for industry to take hold also inhibits economic development.[48]

The precipitously high cost of living exacerbates the economic hardships in Alaska's "bush."[49] Alaskans living in rural villages pay extraordinarily high prices for energy, transportation, and communications due to their communities' isolation far from the road system, their villages' low populations, and the verities of Alaska's extreme climate.[50] In some villages, transportation costs alone may double the price of goods and services.[51] The price of home heating oil in many villages in rural Alaska now hovers around $9/gallon, with a gallon of milk approaching $11/gallon – and the lack of economic opportunities available to offset these costs has caused a "social and cultural crisis" of "out-migration" from villages to urban Alaska.[52]

Mining on ANCSA lands counters these economic challenges by stimulating the job market

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[48] See Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 Nat. Resources J. 86, 87 (1998)

[49] In Alaska, small, rural, difficult to access, and usually largely-Native communities are commonly referred to as "bush" communities. *See, e.g.*, Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 Or. L. Rev. 1 (1998).

[50] Berardi, *supra*, 38 Nat. Resources J. at 96-97.

[51] *Id.* at 87-88.

[52] Rob Stapleton, *Senate hearing in Bethel paints bleak economic picture*, Anchorage Daily News (Sept. 15, 2008), available at http://www.adn.com/money/story/526301.html/.

and providing greater financial self-sufficiency for a growing number of ANCSA Native shareholders.

B. Alaska's growing mining industry plays an increasingly crucial role in fulfilling ANCSA's economic purposes and alleviating poverty amongst Alaska Natives

1. Mining's positive impact on rural Alaska

Rural Alaska is just beginning to benefit economically from the state's growing mining industry. The Alaska Minerals Commission reports that the mining industry's growth has created a significant need for skilled workers – and the opportunity to bring employment and private-sector investment to rural Alaska.[53] And according to the Alaska Department of Commerce, employment in the mining industry is a significant contributor to rural employment and corresponding economic prosperity.[54]

2. Increased mining in rural Alaska benefits ANCSA corporations and their Native shareholders

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[53] Alaska Minerals Comm'n, *Report of the 2008 Alaska Minerals Comm'n* at 8.

[54] Alaska Dept. of Commerce, Community, & Economic Development, Office of Economic Development, Minerals Development.

In the years following passage of ANCSA, some Regional Corporations struggled to realize the promise of ANCSA.[55] But the situation has begun to turn around within the last ten years or so, and a majority of Native Corporations now generate significant profits and distribute substantial shareholder dividends.[56] While many factors have played into the ANCSA corporations' success,[57] resource development on corporate lands is now a major contributor to this turnaround.

The NANA Regional Corporation (located in the remote far northwest corner of Alaska)[58] provides the preeminent example of how large-scale mining can help fulfill ANCSA's promise of meeting the "economic and social"[59] needs of Alaska Natives. As part of its ANCSA land selections, NANA took title to lands in northwest Alaska that contain the world's largest zinc deposit.[60] The Red Dog Mine – the

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[55] Colt, *supra*, 25 J. Land Resources & Envtl L. at 160; Linxwiler, *supra*, 53 Rocky Mtn Min. L. Inst. at 12-60 – 12-61.

[56] Colt, *supra*, at 162-163; Linxwiler, *surpra*; Alaska Dept. of Commerce, Community, & Economic Development, *Alaska Economic Performance Report 2005: Alaska Native Corporations* at 17-21 (available at http://www.commerce.state.ak.us/dca/pub/AEPR_Web_2005.pdf) (last visited Sept. 12, 2008). For instance, in 2004, the thirteen Regional Corporations and twenty-nine Village Corporations surveyed generated combined revenue of $4.47 billion, distributed $117.5 million in dividends, and employed 3,116 Alaska Native shareholders. Linxwiler, *supra*, at 12-61.

[57] *Id.*

[58] 43 U.S.C. § 1606(a)(3). *See* NANA Corporation website, at http://www.nana.com (last visited Sept. 12, 2008).

[59] 43 U.S.C. § 1601(b).

[60] *See* Colt, *supra*, 25 J. Land Resources & Envtl L. at 161.

world's largest zinc mine – was developed on this land.[61] The Red Dog Mine is operated through a joint venture arrangement between NANA and Teck Cominco Alaska Incorporated.[62]

NANA and its shareholders reap great benefits from this arrangement. In 1996, NANA shareholders held almost 50 percent of the jobs at Red Dog Mine.[63] More recently, shareholder employment at the mine has reached 60 percent.[64] (Through the joint venture agreement, the long-term goal for shareholder employment is 100 percent.[65]) In 2007, Red Dog Mine supported 475 full-time jobs (plus 80 part-time jobs) with a total payroll of $48.9 million.[66] The partnership also provides many other economic and social benefits to NANA and its shareholders. [67]

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[61] *See* NANA Regional Corporation website, http://www.nana.com/ (last visited Sept. 12, 2008, *supra*); Teck Cominco: Red Dog Mine, http://www.teckcominco.com/Generic.aspx?PAGE=Red+Dog+Site%2FNANA&portalName=tc/ (last visited Sept. 12, 2008).

[62] *Id.*

[63] Colt, *supra*, 25 J. Land Resources & Envtl L. at 161.

[64] NANA Corporation: Red Dog Mine, available at http://www.nana.com/pdfs/NANA%20and%20Mining.pdf (last visited Sept. 12, 2008).

[65] *Id.*

[66] Teck Cominco: Economic Benefits to Alaskans, http://www.teckcominco.com (last visited Sept. 12, 2008).

[67] NANA Regional Corporation, *Red Dog Mine* 15, *available at* http://www.nana.com (last visited Sept. 18, 2008).

On top of these benefits, Teck Cominco also pays substantial royalties to NANA. Teck Cominco has paid $222 million in royalties to NANA since 1982; NANA received $58 million in royalties in 2007 alone.[68] While much of this revenue goes back to NANA shareholders, through the revenue-sharing provisions of ANSCA § 7(i), most of this revenue goes to other regional and village Native Corporations and their shareholders.[69]

Other Native Corporations are now attempting to recreate the success of the Red Dog mine on their own lands. The Calista Corporation is another example—it is one of the twelve regional land-owning Native Corporations (and one of the largest, with 13,000 shareholders[70]), and owns land in southwest Alaska.[71] Southwest Alaska is one of the poorest regions of the state, with high unemployment, and low per capita income relative to the extreme cost of living.[72] An estimated 25 percent

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[68] *Id.*

[69] 43 U.S.C. § 1606(i), (j). *See also* NANA Corporation: ANCSA at 3, *available at* http://www.nana.com/pdfs/ANSCA.pdf (last visited Sept. 12, 2008); Tim Bradner, *Teck Cominco sets revenue records at Red Dog mine*, Alaska J. of Commerce (Nov. 4, 2007), *available at* http://www.alaskajournal.com/stories/110407/nat_20071104022.shtml (last visited Sept. 12, 2008).

[70] Colt, *supra*, 25 Land Resources & Envtl L. at 161-162.

[71] 43 U.S.C. § 1606(a)(4). *See* Calista Corporation, website, http://www.calistacorp.com/ (last visited Sept. 12, 2008).

[72] Colt, *supra*, at 161-162; Huskey, *supra*, 24 J. Land Resources & Envtl, L. at 438-443.

of the Native population in southwest Alaska lives in poverty – more than any other region in the state.[73]

The Donlin Creek Gold Mine project holds the potential to increase the economic opportunities available to Calista shareholders. Donlin Creek is a world-class gold deposit on native land owned by Calista and the Kuskokwim Village Corporation.[74] The Donlin Creek deposit is estimated to hold over 29.5 million ounces of gold (worth over $26.5 billion at current prices).[75]

If it is developed, Donlin Creek holds the potential to be the "next Red Dog" for the Calista and Kuskokwim Native Corporations and their shareholders.[76] Donlin Creek is currently in the advanced exploration and pre-development stages, and the Donlin Creek Project is now "the single largest economic stimulus in the Kuskokwim Region", according to the Calista Corporation.[77]

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[73] Alaska Native Policy Center, *Our Choices, Our Future: The Status of Alaska Natives 2004* at 100.

[74] *See* Elizabeth Bluemink, *Donlin Creek gold supply leaps 77 percent*, Anchorage Daily News (Feb. 9, 2008), *available at* http://www.adn.com/money/story/309877.html (last visited Sept. 12, 2008).

[75] *Id.*

[76] NANA Corporation: Red Dog Mine at 1, *available at* http://www.nana.com/pdfs/NANA%20and%20Mining.pdf (last visited Sept. 12, 2008).

[77] Calista Corporation: Land & Natural Resources: Donlin Creek, http://www.calistacorp.com/landresources/projects/donlincreek.asp (last visited Sept. 12, 2008).

Mine operators NovaGold Resources and Barrick Gold Corporation have spent $120 million on the Donlin Creek project. As of 2006, Alaska Natives (Calista and Kuskowkwim shareholders) made up 93 percent of the Donlin Creek workforce; these employees have cumulatively earned in excess of $2 million per year from the project.[78] And these workers came from twenty-three villages in the rural Yukon-Kuskokwim region surrounding Donlin Creek – where economic needs are most acute.[79]

Red Dog and Donlin Creek merely exemplify the critical role mining serves in fulfilling ANCSA's economic promise – not only to NANA and Calista and their shareholders, but under ANCSA § 7(i), to all Native Corporations and their shareholders. In addition, mining provides economic benefits to Native corporations and communities beyond the rents and royalties paid to ANCSA Corporations, as illustrated in the next section regarding Goldbelt Inc's relationship with the Kensington mine. By generating revenue and jobs, large-scale mining is helping to fulfill ANCSA's economic promise. And crucially, projects such as Red Dog, Donlin Creek, and Kensington are in remote areas of the state where other economic opportunity and private-sector investment is largely absent.

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[78] *Id.*; Alaska Div. of Geological & Geophysical Surveys, *Alaska's Mineral Industry 2006: Special Report 61* at 19.

[79] *Id.*; Huskey *supra*, 24 J. Land Resources & Envtl. L. at 438-443.

C. The Ninth Circuit's decision threatens to impede economically beneficial mining projects and harm Native Corporations and their shareholders

Large-scale mining operations on Native lands generate substantial revenue and employment for Native Corporations and their shareholders. Shareholders often use their ANCSA shareholder disbursements to support subsistence activities, which are a central element of Alaska Native family economies, as well as personal and cultural identity.[80] Thus, these mining operations are crucial in fulfilling ANCSA's purposes. But as the Kensington mine illustrates, the Ninth Circuit's decision threatens to halt these positive developments.

When it held Coeur Alaska's Section 404 permit to be invalid under the Clean Water Act, the Ninth Circuit also vacated a permit the Corps issued to Goldbelt, Inc. (the ANCSA corporation for the Juneau region) for construction of a marine terminal facility.[81] (The background and purpose of the marine terminal facility are discussed at length in Goldbelt's brief to the Court). Although the Kensington mine is located on state rather than ANCSA lands, Goldbelt's facility was an integral part of the Kensington project's operating plan.[82]

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[80] Bedardi, *supra*, 38 Natural Resources J. at 98-99.

[81] J.A. 517(a).

[82] *See generally*, Brief of Goldbelt, Inc. in support of Petitioners

The Ninth Circuit's decision dealt a serious blow to Goldbelt's mission to generate jobs and income for its shareholders in connection with the Kensington project.[83] The effects of the Ninth Circuit's decision are especially severe given the bleak economic picture in southeast Alaska caused by the decline of the timber and fishing industries, and stagnating government employment.[84]

The Kensington project shows how the court of appeals' decision will obstruct environmentally-sound resource development in Alaska. As the amicus brief of the National Mining Association (filed in support of the petitioner) shows, the disposal of mining fill often requires placement in water bodies or wetlands, since mining typically takes place in rugged terrain where water bodies are the feasible site for disposal.

This is particularly true in Alaska, given the state's extensive amount of wetlands. Alaska holds 175 million acres of wetlands, comprising about 43 percent of Alaska's surface area – in other words, more than the rest of the United States combined.[85] Native Corporations are the largest private

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[83] Brief of Goldbelt, Inc. in support of Petition for Review at 5-6.

[84] *Id.* at 4-5.

[85] Amicus Brief of Council of Alaska Producers in support of Petitioner at 4-5 (citing Environmental Protection Agency et al, *Alaska Wetlands Initiative Summary Report* at 2 (1994).

landowners in Alaska, and about 11 percent of Alaska's wetlands are located on ANCSA lands.[86]

These wetlands are most abundant in the northern and western regions of the state, where the proportional Alaska Native (and ANCSA shareholder) population is highest.[87] ANCSA requires that these lands be available for economic development purposes; the Clean Water Act should not be interpreted in a way that eviscerates this mandate. *Cf. City of Angoon v. Marsh*, 749 F.2d 1413, 1418 (9th Cir. 1984) (permitting Native Corporation to log ANCSA lands within Admiralty Island National Monument on rationale that lands were selected for purposes of their economic benefit).

As the Council of Alaska Producers points out, developing large-scale mines in these regions is virtually impossible without impacting these pervasive wetlands in one way or another.[88] And as demonstrated above, it is likely that such mines will be located on ANCSA lands, or will otherwise benefit Native Corporations and their shareholders who are dispersed throughout rural Alaska – in terms of jobs, revenue and dividends, and social programs provided by the Corporations.[89] But the Ninth Circuit's

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[86] *Id.* at 5.

[87] *Id.* at 5-6; Alaska Native Policy Center, *Our Choices, Our Future: The Status of Alaska Natives 2004* at 37-39.

[88] See Amicus Brief of Council of Alaska Producers at 8.

[89] U.S. Gov't Accountability Office, *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* 82-83 (describing direct and indirect benefits ANCSA corporations provide to Native shareholders).

flawed reasoning leaves the viability of future resource development on ANCSA lands in doubt.

The Clean Water Act should continue to play its vital role in ensuring that natural resources are developed in an environmentally-responsible manner. But in this case, the Ninth Circuit's holding – that the Clean Water Act prohibits the Corps of Engineers from issuing a Section 404 permit for the discharge of fill material whenever the discharge implicates an effluent restriction contained in Section 402 or its implementing regulations – runs counter to the plain language of the Act, and overturns the EPA's and Corps' carefully-considered permitting program for the regulation of mine tailings.

And contrary to this Court's long-established principle of administrative law, the Ninth Circuit's decision has set a dangerous precedent against the extraordinary deference that must be afforded to an agency's interpretation of its own regulations. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Given the Ninth Circuit's failure to accord such deference in this case, the doors are wide open for the federal courts to strike down the permitting agencies' regulations governing other resource development projects – even where such a plan has the least impact on the environment of all available alternatives (as in this case).

CONCLUSION

Mining is critical to Alaska's economic future, and especially to the future of Alaska's economically disadvantaged Native communities. But the Ninth Circuit's erroneous interpretation of the Clean Water Act's permitting requirements threatens to halt future mining projects. This Court should reverse the Ninth Circuit's flawed decision, and restore to the federal permitting agencies the authority to maximize the responsible development of Alaska's mineral resources – and the concomitant benefits that flow to Native Corporations and their shareholders in Native communities throughout Alaska.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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COEUR ALASKA, INC.,
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. *Background* 4

A. *Fresh Water, a Precious Limited Resource* 6

B. *Mining and Freshwater Ecosystems* 8

C. *Potential Impacts of Tailings to Aquatic Ecosystems* 8

II. *Tailings: Metals, Process Chemicals and Organics* 11

A. *Cadmium and Aquatic Organisms* 12

B. *Copper and Aquatic Organisms* 13

C. *Cyanide and Aquatic Organisms* 15

D. *Lead and Aquatic Organisms* 15

E. *Zinc and Aquatic Organisms* 16

III. ***Impacts of Milling Waste Disposal in Lakes, and the Failure of Current Mitigation Technology to Alleviate Water Quality Concerns at Mines*** 16

IV. ***Why Use Waters of the US for Ore Beneficiation Mill Waste Disposal?*** 18

V. ***Canadian Lake Disposal – A Policy Perspective*** 25

A. *Background on Canadian Federal Discharge Limits for Mining* 25

B. *Stated Intent of Canadian Lake Disposal Regulation Versus its Application* 28

C. *Vale-Inco Example* 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

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INTEREST OF *AMICI*

Amici are three expert mining and water quality scientists, with diverse backgrounds in the private, public, and public interest sectors.[1] Collectively, the *amici* have worked extensively within the mining industry, within the governmental entities charged with regulating mining and milling impacts, in academia studying the technical and scientific aspects of these impacts, and in providing expert advice to mining and with milling-affected communities around the globe. *Amici* are deeply interested in this case, as its outcome could affect lakes, rivers, and other waterways throughout the United States, and potentially set international precedent for the disposal of processed mill wastes around the world.

David M. Chambers, Ph.D., is president of the Center for Science in Public Participation, a non-profit corporation formed to provide technical assistance on mining and water quality to public interest groups and tribal governments. David Chambers has 32 years experience in mineral exploration and development – 15 years of technical and management experience in the mineral exploration industry, and for the past 17 years he has served as an advisor on the environmental effects of mining projects both nationally and

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici* and their attorneys, has made a monetary contribution to the preparation or submission of this brief.

internationally. He is a registered professional geophysicist (California # GP 972) with a Masters Degree in Geophysics from the University of California at Berkeley, and Professional Engineering Degree in Physics from the Colorado School of Mines. Dr. Chambers received his Ph.D. in Environmental Planning from Berkeley.

Catherine Coumans, Ph.D., is Research Coordinator and responsible for the Asia-Pacific Program at MiningWatch Canada, a non-profit organization that provides policy advice to the Canadian government and research and technical support to mining-affected communities. Dr. Coumans' academic work on mining dates back to her Ph.D. research in the Philippines in 1988-1990. She has provided expert testimony on mining in two congressional inquiries in the Philippines (1999, 2001), as well as before the Constitutional Court in Indonesian (2005) and before the Sub-Committee on Human Rights and Democratic Development in Canada (2005). Dr. Coumans participates in multi-stakeholder processes led by the Canadian government, providing expertise on water issues through Mine Environment Neutral Drainage (2003-present) and reviews of the Metal Mining Effluent Regulations (1999 - present). She holds an M.Sc. (London School of Economics) and a Ph.D in anthropology (McMaster University, Hamilton, Ontario).

Carol Ann Woody, Ph.D., has over 25 years of professional experience including: 13 years as a scientist with the USGS; 4 years as a researcher with the Fisheries Research Institute at the University of Washington, and 2 years at the

National Fishery Research Laboratory in Wisconsin. She is a past- President of the Alaska Chapter of the American Fisheries Society and Adjunct faculty at the University of Alaska. Her research on salmon behavior, genetics, and evolution is published in more than 25 peer-reviewed journals and a recent book focused on sockeye salmon. Her current research focuses on identifying risks to fisheries relative to industrial mining.

SUMMARY OF ARGUMENT

With the passage of the Clean Water Act cleaning up and maintaining clean water became a policy of the U.S. Government. This legislation reflected the growing problems with pollution of rivers and lakes in this country. The mining industry contributed significantly to this pollution with its pre-1970 waste disposal practices. Allowing mining operations to dispose of process wastewater in lakes (and potentially rivers and streams) would be a return the pre-Clean Water Act policy of process waste disposal.

It is not necessary to use natural water bodies for the disposal of mill process tailings and wastewater. If lakes (and potentially rivers) are allowed to be utilized for the discharge of mill process wastewater and tailings, there will be impacts. While the ability to predict the chemical reactions that drive water contamination is much better now than it was even ten years ago, it is still not good enough to predict impacts on aquatic organisms due to the long term migration of low levels of metals. The present state of the sciences geochemistry and aquatic biology does not allow us to predict with certainty

magnitude and term of the impacts on lakes used for these discharges.

The only advantage in using lakes for mill process wastewater discharges is the cost savings to mining companies. Man-made structures can and have been successfully employed for this type of waste disposal, both financially and technically, for over 35 years.

The mill waste disposal in lakes situation in Canada, which was similar to that in the U.S. in terms of its prior prohibition of the use of lakes for process waste disposal, is demonstrating that mining companies will preferentially use lakes over man-made impoundments because of cost savings, and that it will be the mill process waste with the most potential to contaminate water which will be placed in these lakes.

ARGUMENT

I. *Background*

Robert Redford's 1992 movie, "A River Runs through It"[2] made the Blackfoot River in Montana famous, depicting a pristine river that daily yielded healthy trout to two fly fishing brothers. The Blackfoot meets with and becomes the Clark Fork River at the Milltown Reservoir near Missoula, Montana. Both rivers have been impacted by mining. Over 200 km (124 miles) of the Clark Fork River are contaminated from about 99.8 billion

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[2] Movie based on a novel by Norman F. Maclean.

kilograms (220 billion pounds) of mine tailings.[3] United States Environmental Protection Agency (EPA) scientists found that metals from these tailings contaminated local wells and caused multiple fish kills.[4] The region is one of the Nation's largest Superfund sites and is the focus of an ongoing massive cleanup campaign costing hundreds of millions of dollars.[5]

The EPA reports that "States have identified almost 300,000 miles of rivers and streams and more than 5 million acres of lakes that do not meet state water quality goals. Many of these waters are not considered safe for swimming and are unable to support healthy fish or other aquatic life."[6] The 2004 National Listing of Fish Advisories is an EPA database of all available information describing federal, state and tribal issued fish consumption advisories in the U.S. and Canada; it lists 3,221 advisories.[7] Waters under advisory represent:

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[3] Glenn Philips & Joshua Lipton, *Injury to aquatic resources caused by metals in Montana's Clark Fork River basin: historic perspective and overview*, Canadian Journal of Fisheries and Aquatic Sciences 52: 1990-1993 (1995).

[4] Robert M. Hughes, *Use of watershed characteristics to select control streams for estimating effects of metal mining wastes on extensively disturbed streams*, Environmental Management 9:253-262 (1985). *See also*, http://cfrtac.org/clarkforksite.php

[5] http://www.epa.gov/region08/superfund/mt/milltown/factsheets.html

[6] U.S. Environmental Protection Agency, *Liquid Assets 2000, America's water resources at a turning point*, (2000), http://www.epa.gov/ow/liquidassets/.

[7] The National Listing of Fish Advisories (NLFA) available at http://map1.epa.gov/

- 35% of the Nation's total lake acres (excluding the Great Lakes), or approximately 14,285,062 lake acres

- 24% of the Nation's total river miles, or approximately 839,441 river miles

- 65% of the Nation's contiguous coastal waters (excluding Alaska) including 92% of the Atlantic coast and 100% of the Gulf coast

- 100% of the Great Lakes and their connecting waters.

Mining waste has contributed significantly to the impairment of our Nation's freshwater ecosystems.[8]

A. *Fresh Water, a Precious Limited Resource*

Over half of the human body is comprised of water, without which it could not survive. Although 75% of the planet Earth is covered with water, just 3% is fresh, and less than 1% of that is usable.[9] The health of human beings is inextricably linked to the health of aquatic ecosystems and these systems' continued ability to provide "ecosystem services", such as clean fresh water to drink and uncontaminated fish to catch and eat. Freshwater ecosystems provide many services, for example they:

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[8] Walter K. Dodds, *Freshwater Ecology Concepts and Environmental Applications* 271 Figure 14.2 (2002);, Ronald Eisler, *Handbook of Chemical Risk Assessment*, Volume 1, Metals 656 668 Table 9.6, 927-931 (2000).

[9] Brett Schulte, *"A World of Thirst,"* U.S. News and World Report, June 4 2007, at 1.

- transport water vital to the survival of life within a region.

- act as a "storage" area for excess nutrients, sediment, and other pollutants that could degrade our waterways.

- recharge groundwater aquifers.

- regulate water flow, runoff and erosion.

- cycle nutrients through a host of unique plant and animal species.

- link land and sea acting as a transportation corridor for nutrients, fish, sediments, etc.

- provide beauty and recreation.

- support a diverse aquatic community of fish, insects and plants.

The majority of literature on water pollution focuses, understandably, on its impacts to human health. The current status of the Nation's fishery resources serves as a barometer of how well humans are conserving freshwater ecosystems. The American Fisheries Society Endangered Species Committee recently revised their list of imperiled North American fishes. About 39% of all described North American fishes are now imperiled[10]; 700 species of fishes that rely on freshwater are considered at risk

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[10] Howard L. Jelks, et al., *Conservation Status of Imperiled North American Freshwater and Diadromous Fishes*, American Fisheries Society, Fisheries 33(8): 372-405 (2008).

and habitat degradation is considered a primary factor in their decline.

B. *Mining and Freshwater Ecosystems*

Hardrock metals mining was the number one source of toxic pollution in our Nation during 1998 to 2006, with 1998 being the first year, and 2006 being the most recent year available, that the industry reported to the Environmental Protection Agency's Toxic Release Inventory.[11] The EPA estimates 500,000 abandoned hardrock mines exist in the U.S. and that 40% of western headwater streams are polluted from mining; clean up costs are estimated at $32 - 72 billion,[12] with no federal funds available for cleanup. Between 1961 and 1975 a conservative estimate of fish killed by mining-related incidents was 10 million;[13] no recent estimates are available.

C. *Potential Impacts of Tailings to Aquatic Ecosystems*

Tailings, one waste generated from mining, can comprise over 99% of the total processed ore;[14] for example, processing 10 million tons of ore can

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[11] U.S. Environmental Protection Agency (EPA TRI), Toxics Release Inventory, TRI Explorer (2007). Accessed online 4 Oct. 2007 at http://www.epa.gov/triexplorer/.

[12] U.S. Environmental Protection Agency, *Liquid Assets 2000, America's water resources at a turning point*, (2000), http://www.epa.gov/ow/liquidassets/

[13] U.S. Environmental Protection Agency, *Fish kills caused by pollution: fifteen year summary, 1961-1975*, EPA-440/4-78-006 (1979).

[14] Bernd G. Lottermoser, *Mine Wastes, characterization, treatment, environmental impacts* 152-157 (2d ed. 2007).

produce up to 9.9 million tons of tailings. Mine tailings contain solids and liquids, metals, and processing chemicals. The solids are primarily clay, silt and sand. Some mined minerals and associated elements will occur in tailings, such as: aluminum, antimony, arsenic, barium, cadmium, copper, chromium, cobalt, iron, lead, manganese, mercury, molybdenum, nickel, selenium, silver, thallium, zinc, sulfides, and natural radioactive constituents. Process wastewater will contain process chemicals (e.g., Cyanide, Xanthates, etc.) and some petroleum products (e.g., diesel, oil, gas, etc.).[15] Tailings that contain reactive sulfides - a common component in hard rock deposits - can generate sulfuric acid if exposed to both air and water.[16] The mill process wastewater and solid components of tailings can harm aquatic organisms and impair natural ecosystem function.

Ore beneficiation mill tailings and process wastewater can affect aquatic life both directly and indirectly, and effects can be lethal, nonlethal, or chronic. Disposal of fine sand, silt and clay into lakes can increase turbidity of water and bury living benthic organisms. Turbidity acts like an umbrella, limiting solar energy transmission to aquatic plants for photosynthesis thereby reducing overall lake productivity. Suspended solids can cause sublethal effects on fish and invertebrates including reproductive interference, reduced feeding and growth, respiratory impairment, reduced tolerance

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[15] *Id.*

[16] U.S. Environmental Protection Agency, *Acid Mine Drainage Prediction* (1994); http://www.epa.gov/nps/acid_mine.html.

to disease and toxicants, and physiological stress.[17] Tailings solids deposited on the benthos (bottom dwelling organisms) can suffocate sedentary invertebrates and fill interstitial spaces of gravel where they live. Changing bottom sediment size from larger to smaller (e.g., gravel to silt) changes invertebrate abundance, diversity and species richness.

For example, fish such as salmonids and char generally prefer mayflies (Ephemeroptera), stoneflies (Plecoptera) and caddisflies (Trichoptera). These live in interstitial spaces of gravel. If fine sediment loads increase significantly (feet or more), less preferred, less accessible, mud burrowers such as worms (Oligochaetes) and caddisflies (Chronomids) increase.[18] Tailings solids deposited on gravels can suffocate developing fish embryos and alevins[19] and can reduce available spawning, incubation, and cover habitat for fish.[20] Fine sediment from mill discharges can have significant direct and indirect impacts on aquatic communities. However, it is important to remember that mill discharges contain not just clay, silt and sand; but the mill process wastewater also contains metals, process chemicals and organics.[21]

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[17] Thomas F. Waters, *Sediment in streams*, American Fisheries Society, Monograph 7 82 (1995); Walter K. Dodds, *Freshwater Ecology* 291 (2002).

[18] Thomas F. Waters, *Sediment in streams*, American Fisheries Society, Monograph 7, (1995).

[19] Alevins = newly hatched fish

[20] Thomas F. Waters, *Sediment in streams*, American Fisheries Society, Monograph 7 79-118 (1995).

[21] Bernd G. Lottermoser, *Mine Wastes, characterization, treatment, environmental impacts* 153-157 (2d ed. 2007).

II. *Tailings: Metals, Process Chemicals and Organics*

"The processing of ore promotes the dissolution and mobilization of elements present in the ore...Consequently, tailings undergo chemical reactions after their deposition in the repository and their composition changes over time."[22] Tailings composition varies greatly among ore beneficiation mills as do physical, chemical and biotic components among lakes, as do environmental conditions through time (e.g., wind, rain, earthquakes). When so many dynamic parameters are integrated into predictive mathematical models of future conditions, prediction accuracy declines,[23] making restoration success difficult to predict. To date, fisheries scientists are still teasing apart effects *of a single metal* on an aquatic organism under different environmental conditions and exposure methods (e.g., ingestion[24] or water exposure) without regard to *cumulative effects* of added stressors, such as fine sediments, other metals, organics, petroleum products, and global warming.

Toxicity of metals and organic chemicals to aquatic creatures varies depending on many factors of water quality, including: pH, temperature, hardness, salinity, suspended solids, organic content in water; presence of other elements, organism species, age, size, sex, prior exposure, and whether

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[22] *Id.* at 154.

[23] John Neter, et al., *Applied linear regression models*, (2d ed. 1989).

[24] Joseph S. Meyer, et al., *Toxicity of dietborn metals to aquatic organisms*, Society of Environmental Toxicology and Chemistry (SETAC Press) (2005).

organisms encounter the element in the water or ingest it.[25] Mill wastewater discharges are a complex cocktail of metals, metalloids and organics; many of which alone can be toxic to aquatic species at very low concentrations. To illustrate this concept, toxic effects of single elements commonly occurring in wastewater discharges are highlighted below.

A. *Cadmium and Aquatic Organisms*

Cadmium is a relatively rare metal, and is highly toxic to all life.[26] It is always found in association with zinc and is a byproduct of copper, zinc and lead production; it is associated with sulfide ores which can be acid generating.[27] Cadmium is cancer-causing with severe sublethal and lethal effects at low environmental concentrations.[28] Several species of freshwater invertebrates and fish show high mortality at concentrations of 0.8 to 9.9 parts per billion (ppb: equivalent to one drop in 2,200 gallons).[29] Water concentrations exceeding 10.0 ppb of cadmium are associated with high fish mortality, reduced growth, inhibited reproduction, and impaired breathing, muscle contractions, and

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[25] Elsa M. B. Sorenson, *Metal Poisoning in Fish* (1991); Ronald Eisler, *Handbook of Chemical Risk Assessment Volume 1 Metals Volume II Organics* (2000).

[26] Ronald Eisler, *Handbook of Chemical Risk Assessment*, Volume 1 Metals 1 (2000).

[27] Earle A. Ripley, et al., *Environmental effects of mining* 157 (1996).

[28] Ronald Eisler, *Cadmium hazards to fish, wildlife, and invertebrates: a synoptic review*, US Fish Wildl. Ser. Biol. Rep. 85(1.2) (1985).

[29] Parts per billion (ppb) corresponds to one penny in $10,000,000, or 1 second in one second of time in approximately 31.7 years.

enzyme activity.[30] Cadmium bioaccumulates at all trophic levels and accumulates in the livers and kidneys of fish.[31]

B. *Copper and Aquatic Organisms*

Copper is a heavy metal and an essential element. However, it is one of the most toxic metals to aquatic life and can accumulate and cause harm at concentrations just above that needed for growth and reproduction.[32] Slight increases in dissolved copper above normal background levels can reduce productivity of key links in aquatic food chains including algae, zooplankton, insects and fish.[33] In salmon, increases of just 2-10 ppb above natural levels, has been shown to affect their sense of smell, which is crucial to homing, feeding, and predator avoidance.[34] Copper can interfere with normal

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[30] Ronald Eisler, *Handbook of Chemical Risk Assessment*, Volume 1 Metals 19 (2000).

[31] Emmanual Sindayigaya, et al., *Copper, zinc, manganese, iron, lead, cadmium, mercury, and arsenic in fish from Lake Tanganyika, Burundi*, The Science of the Total Environment 144:103-115 (1994); Muhammad Sadiq, *Toxic metal chemistry in marine environments* (1992).

[32] Susan B. Betzer & Paul P. Yevich, *Copper toxicity in Busycon canaliculatum L.*, The Biological Bulletin 148:16-25 (1975); W. Scott Hall, et al., *Monitoring dissolved copper concentrations in Chesapeake Bay, USA*, Environ. Monitoring and Assessment 11:33-42 (1988).

[33] Ronald Eisler, *Handbook of Chemical Risk Assessment*, Volume 1 Metals 656-668 Table 9.6, 927-931 (2000).

[34] David H. Baldwin, *Sublethal effects of copper on salmon*, Environmental Toxicology and Chemistry 22(10): 2266–2274 (2003); James A. Hansen, et al., *Chinook Salmon (Oncorhynchus tshawytscha) and rainbow trout (Oncorhynchus mykiss) exposed to copper: neurophysiological and histological effects on the olfactory system*, Environmental Toxicology and

migration, impair immune systems, interfere with brain function and breathing, disrupt osmoregulation, delay or accelerate natural hatch rates, and change enzyme activity, blood chemistry and metabolism.[35] Recent evidence suggests that copper is an endocrine disruptor.[36] Copper often co-occurs with zinc at hard rock mines. When combined in hard water at a ratio of 6 parts zinc to 1 part copper, additive toxicity results (individual toxicities are summed), but when combined in soft water, copper has a synergistic toxicity (more than additive toxicity).[37] Such interactions among elements and the resulting effects on aquatic species are neither well studied nor understood.

Chemistry 18(9):1979-1991 (1999); Toshiaki J. Hara, et al., *Effects of copper and mercury on the olfactory response in rainbow trout, Salmo gairdneri,* Journal of the Fishery Research Board of Canada 33:1568-1573 (1976); Janet Raloff, *Aquatic Non-Scents: repercussions of water pollutants that mute smell,* Science News 4:49-66 (2007).

[35] U.S. Environmental Protection Agency, *Wildlife Exposure Factors Handbook.* vol. I. EPA/600/R-93/187a (1993); Michael T. Horne & William A. Dunson, *Effects of low pH, metals, and water hardness on larval amphibians,* Archives of Environmental Contamination and Toxicology 29:500-505 (1995); James A. Hansen, et al., *Differences in neurobehavioral responses of Chinook salmon (Onchorhynchus mykiss) exposed to copper and cobalt: behavioral avoidance,* Environmental toxicology and chemistry (1998).

[36] Daniel A. Medesani, *Interference of cadmium and copper with the endocrine control of ovarian growth, in the estuarine crab Chasmagnathus granulata,* Aquatic Toxicology 69(2):165-174 (2004).

[37] Elsa M.B. Sorensen, *Copper* in *Metal Poisoning in Fish* 235–284 (Elsa M.B. Sorensen ed. 1991).

C. *Cyanide and Aquatic Organisms*

Sodium cyanide is an organic chemical, commonly used as a process chemical to extract gold from mined ore. It is highly toxic to fish at low concentrations.[38] Fish are sensitive to cyanide and exhibit chronic effects at 5 to 7 parts per million (ppm) and lethal effects at 20 to 76 ppm.[39] Sublethal effects in fish include reduced reproductive capacity (decreased egg number and viability, and reduced embryo and larval survival), impaired swimming ability, altered growth, and hepatic necrosis (liver disease).[40] Invertebrates show adverse nonlethal effects between 18 and 43 ppb and lethal effects between 30 and 100 ppb.[41]

D. *Lead and Aquatic Organisms*

Lead is neither essential nor beneficial to life and causes adverse effects on human survival, metabolism, growth, development, behavior, learning, and reproduction.[42] Adverse effects on aquatic life are shown at waterborne concentrations of 1.0 to 5.1 ppb, and bioconcentrates in aquatic species. Lead commonly occurs in association with

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[38] Gerard Leduc, et al., *The effects of cyanides on aquatic organisms with emphasis upon freshwater fishes*, National Research Council of Canada, NRCC 19246 (1982).

[39] http://www.epa.gov/region5superfund/ecology/html/toxprofiles.htm#al; Ronald Eisler, *Handbook of Chemical Risk Assessment. Volume 2 Organics* 904-905 (2000).

[40] Ronald Eisler, *Handbook of Chemical Risk Assessment. Volume 2 Organics* 904-905 (2000).

[41] *Id.* at 927-931.

[42] *Id.* at 269.

zinc, copper, iron, and silver in sulfide ores. Waterborne criteria for the protection of aquatic life range from 1.3 to 7.7 ppb, although within this range adverse effects are documented.[43]

E. *Zinc and Aquatic Organisms*

Zinc is an essential element and occurs with sulfides in ore.[44] Significant adverse effects on growth, survival, and reproduction occur in plants, fish amphibians, and invertebrates at zinc concentrations between 10–25 ppb.[45] Zinc is usually found in sulfide ores with copper, lead and trace amounts of cadmium, thallium and other metals.[46]

III. *Impacts of Milling Waste Disposal in Lakes, and the Failure of Current Mitigation Technology to Alleviate Water Quality Concerns at Mines*

Scientists are beginning to study primary causal factors in the decline of aquatic species affected by multiple stressors due to mining. One tool in such studies is called paleolimnology, where cores of lake sediments are removed and annual sediment layers dated and analyzed to determine when species

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[43] *Id.* at 280.

[44] Carl-Gustaf Elinder, *Zinc* in *Handbook on the Toxicology of Metals* v.2 664-679 (Lars Friberg, et al., eds., 2d ed. 1986).

[45] Ronald Eisler, *Zinc hazards to plants and animals with emphasis on fishery and wildlife resources* in *Ecological issues and environmental impact assessment, Advances in environmental control technology series* 443-537 (Paul N. Cheremisinoff ed., 1986).

[46] Whitmel M. Joyner (ed.), *Compilation of air pollutant emission factors* (4th ed. 1985).

declined and what elements might have caused their decline during that period.

One study examined the cause of invertebrate declines in Lake Superior due to discharge of over half a billion metric tones of tailings from copper and silver mining.[47] The study found biological life indicators decreased during the period of discharge and hypothesized that discharge of copper was a likely factor in biotic decline. The study tested its hypothesis by creating sediment suspensions in aquaria with pre-mining and active mining sediment layers from lake cores. The sediment suspension made with the layer representing active mining caused high mortality of aquatic invertebrates, with high copper concentrations found to be causal. The study also determined that resting eggs from the invertebrates could not be hatched from sediments older than 70 years in age, the period of intense mining.[48]

Despite the historical evidence, there is a perception that "modern mining" does not cause significant harm to water quality, largely due to innovative technological advances. However, a recent comparison of predicted versus actual impacts to water quality at 25 modern hard rock mines showed 76% violated U.S. EPA water-quality standards, despite predictions made from 1979 to 2003 that they would not.[49] Levels of potentially

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[47] John P. Smol, *Pollution of Lakes and Rivers* 142-143 (2008).

[48] *Id.*

[49] James Kuipers & Ann Maest, et al., *Comparison of Predicted and Actual Water Quality at Hardrock Mines: The reliability of predictions in Environmental Impact Statements* (2006); James Kuipers & Ann Maest, et al., *Predicting Water Quality at*

toxic metals at surveyed mines, such as lead, mercury, and cadmium, exceeded EPA standards for ground and surface water at 63% of sites, and levels of arsenic and cyanide exceeded standards at over 50% of sites.[50] Mining technology has improved vastly over historic practices. However, pollution problems persist today, especially when sulfide ores are mined in regions with nearby ground and surface waters.[51]

IV. *Why Use Waters of the US for Ore Beneficiation Mill Waste Disposal?*

Mining has been an important part of the American economy for over 150 years. It arguably led the way to settling the West. During the late 1800s and early 1900s mining drove settlement of the largest cities in the west, from Denver to San Francisco, and enriched miners and mining investors. In its heyday mines provided jobs for tens of thousands of miners, and for workers in support industries that supplied food, equipment, and entertainment for these miners. There was little thought or concern for mine waste disposal in that era, although it was understood even then that mining could have significant environmental impacts. Georgius Agricola published his seminal and oft-quoted work on mining and metallurgy in 1556,[52] and noted the impacts from acid mine

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Hardrock Mines: Methods and Models, Uncertainties, and State-of-the-Art (2006).

[50] *Id.*

[51] *Id.*

[52]Georgius Agricola, *De Re Metallica* (1556). Georg Bauer, better known by the Latin version of his name Georgius Agricola, is considered the founder of geology as a discipline.

drainage.[53] In 1893 congress passed the Caminetti Act to limit impacts to California cities from hydraulic placer mining tailings dumped into the Sacramento and San Joaquin river systems.

During that era, which extended into the 1960s, the primary consideration was finding the minerals, and getting them out of the ground at the lowest cost. Mine waste was routinely dumped near or directly into streams, and mine closure consisted of locking the door on the office. Today mining is conducted on a completely different scale. It is no longer the pick and shovel operation that producing a few hundred tons of ore per day. Production from today's mines is often tens of thousands of tons of ore per day, utilizing mass production techniques that not only have resulted in increases in worker productivity that drastically reduced the need for human labor at a mine, but also allows the mining of low grade ores leading to the generation of massive amounts of mine waste. Mining produces significantly more waste on an annual basis than the

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De Re Metallica literally translated, means "On the Nature of Metals." In 1912, the Mining Magazine (London) published an English translation. The translation was made by Herbert Hoover, a mining engineer and future President of the United States, and his wife Lou Henry Hoover.

[53] Acid mine (rock) drainage is a common effluent of metal mining and one of the major environmental impacts resulting from mining activities. It is caused by the natural weathering of pyrite and other metal sulfides in the mineral deposit, or through the accelerated weathering of waste products generated by the mining process. The sulfide minerals react with oxygen in air or pore water and produce sulfuric acid.

total municipal solid waste.[54] Waste disposal from early mining (into the 1960s) has caused the degradation of thousands of miles of streams in the US.[55] Discharges from modern mines are regulated by the Clean Water Act, the Clean Air Act, and state solid waste disposal regulations. Reclamation is required (to differing degrees) by state and federal regulations, and financial sureties are usually required for these reclamation activities. Financial sureties do not cover unplanned or catastrophic events, only those events that are reasonably foreseeable.

With the passage of the Clean Water Act in 1972 mine waste could no longer be dumped in streams or lakes. This has not prevented mining from prospering in the US, even with its environmental laws, because these same institutions that regulate the mining industry provide a great deal of political predictability and stability. To the extent mining has moved to developing countries, this was driven more by the attractiveness of better ore bodies (the best ore bodies in the US have been developed) than by a lack of environmental and social regulation in those countries. Most mining companies will readily say they apply the same high environmental standards in each country they work in – regardless of a lack of regulation in those countries.

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[54] Office of Technology Assessment, *Managing Industrial Solid Wastes from Manufacturing, Mining, Oil and Gas Production, and Utility Coal Combustion* 10, 29, OTA-BP-O-82 (1992).

[55] Carlos Da Rosa & James Lyons, *Golden Streams, Poisoned Dreams* 24 (1997).

Even in a state like Alaska, which contains many lakes and streams and most of the nation's wetlands, regulations under the Clean Water Act have not prevented mining from prospering. At worst it could be argued that it is more expensive to operate a mine under regulations of the Clean Water Act, largely because waste disposal costs must now be internalized to the mining operation.

This raises the question of why mining companies and government regulators would argue they need to return to a policy of allowing the disposal of mine waste in Waters of the US when the industry has been operating without this option for more than 35 years. The primary reason is that tailings disposal in natural water bodies is the cheapest way by far of disposing of mill waste. It is significantly less expensive to use a natural water body than to construct a tailings impoundment. It is generally assumed that it is approximately 10 times less expensive to use a natural water body for waste disposal than to build a tailings impoundment. Using a lake for waste disposal would save the typical mine tens to hundreds of millions of dollars in capital construction costs.[56]

It is generally true that putting tailings underwater is the best way to prevent the onset of acid mine drainage.[57] However, it is not necessary to use natural water bodies for tailings disposal –

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[56] For example, see the Vale-Inco example discussed herein.

[57] "It is apparent from laboratory and field studies, that flooding tailings is the most successful method presently known for preventing and controlling ARD (Acid Rock Drainage)." Ernest K. Yanful & Paul H. Simms, *Review of Water Cover Sites and Research Projects, MEND Project* 2.18.1 (1997).

man-made tailings dams are equally as effective, and potential environmental impacts are more manageable.

Disposal of non-acid generating tailings under water, like the tailings from the Kensington Mine, is not required for geochemical reasons. Disposal of non-acid generating tailings in natural water bodies would be the least expensive method of disposal.

Failures in regulatory agencies' ability to predict and mitigate acid mine drainage and water contamination through the Environmental Impact Statement process are documented in recent research which showed that EISs on mines from 1975 to 2005 failed to predict water quality degradation off the minesite in 76% of the cases studied.[58] This is an abysmal performance record.

There is also a body of research on the effects of tailings disposal in lakes. This research comes from Canada, which has climate and topography similar to that in parts of Alaska, and where there is also recent significant pressure from the mining industry and government regulators to use lakes for mine waste disposal. The research was conducted by an agency of the Canadian federal government, Natural Resources Canada, as a part of its MEND (Mine Environment Neutral Drainage) program.

The research program on subaqueous disposal of tailings in freshwater lakes was prompted by a review in 1992 by the Rawson Academy of Aquatic

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[58] James Kuipers, et al., *Comparison of Predicted and Actual Water Quality at Hardrock Mines* Table ES-7b (2006).

Science, Ottawa, which recommended a thorough study of the viability and impacts of tailings disposal in freshwater lakes.[59] Researchers looked at several lakes that had been used as tailings disposal sites and were now closed for periods ranging from over 20 years to during and just prior to data collection. The research focused on the geochemistry of the tailings after deposition in the lake, the mobility of contaminants from the process wastewater into lake water, and the short and long term impacts on aquatic organisms in the lake.

There were mining-related impacts in all of the lakes used for process wastewater disposal, some major, and some minor. However, the relevant scientific findings from these studies are that: (1) there are still significant gaps in the ability to predict the geochemistry that drives the movement of metals to and from tailings once they have been deposited underwater; and that, (2) it is not yet possible to quantify the long term effects from tailings disposal in lakes on aquatic organisms in these lakes. As one MEND reviewer recently noted: *"It is still a challenge to predict metal bioavailability and toxicity in sediments."*[60]

The science used to predict the chemistry of the water over the tailings, and in predicting potential impacts to any aquatic life living on or in the water

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[59] Rawson Academy of Aquatic Science, *A Critical Review of MEND Studies Conducted to 1991 on Subaqueous Disposal of Tailings*, MEND Project2.11.1d (1992).

[60] Bernard Vigneault & Yamini Gopalapillai, *Literature Review Report: Possible Means of Evaluating the Biological Effects of Sub-Aqueous Disposal of Mine Tailings* 3 (2007).

above the tailings, either in the short or long term, is not precise.[61]

Man-made impoundments are better alternatives to using lakes as a disposal sites for mine waste. This technique has been successfully employed – but constructing an impoundment costs more than using a lake. Supporters of lake-disposal argue that using a lake eliminates long term maintenance and uncertainty with impoundment failure in man-made structures. While there is indeed some uncertainty in man-made structures, mainly related to seismic risk, there is as much or more uncertainty in using natural lakes. Material deposited in lakes is subject to movement due to large storms,[62] earthquakes, avalanches, ice entrainment,[63] seiching,[64] seasonal turnover, currents, and other natural events.[65] Groundwater contamination is also potentially a greater problem with lake disposal, since lakes are hydrologically connected to groundwater, while

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[61] "... the secondary mineral assemblages that accumulate during subaerial exposure could have a profound influence on the geochemical behaviour of the waste when submerged, such that deleterious effects on water quality may result." Bruce Mattson & Ali Sahami, *Assessing the Subaqueous Stability of Oxidized Waste Rock* i, MEND Project 2.36.3 (1999).

[62] Wave Action – Sufficiently large waves can generate velocities along the bed that can mobilize the bed material.

[63] The ice layer can ground on the bed and bond bed material by freezing.

[64] A seiche (pronounced approximately saysh) is a standing wave in an enclosed or partially enclosed body of water. Seiches and seiche-related phenomena have been observed on lakes, reservoirs, bays and seas.

[65] *See* Canada Centre for Mineral and Energy Technology (CANMET), Mine Environment Neutral Drainage (MEND), *Design Guide for the Subaqueous Disposal of Reactive Tailings in Constructed Impoundments*, MEND Project 2.11.9 (1998).

impoundments can be engineered to be isolated from groundwater.

In addition, the mining industry has already created thousands of man-made tailings impoundments which require long term maintenance and are subject to uncertainty of impoundment failure. Impoundments built to submerge tailings under a water cover are virtually identical to the thousands of tailings impoundments already in existence, so using man-made impoundments is neither creating nor exacerbating a problem.

V. *Canadian Lake Disposal – A Policy Perspective*

It is also instructive to describe the present situation with the use of lakes as mine waste disposal in Canada. For many years the Canadians had a similar prohibition on dumping process wastewater from ore beneficiation mills into lakes, but have recently implemented a regulatory change to allow the disposal of mine waste in lakes. The Canadian situation is instructive because it undoubtedly foretells the direction that the mining industry and regulatory agencies will go if process wastewater from ore beneficiation mills is allowed to be dumped into lakes in the US.

A. *Background on Canadian Federal Discharge Limits for Mining*

In 1977 Governor in Council passed the *Metal Mining Liquid Effluent Regulations.* The *Metal Mining Liquid Effluent Regulations* (MMLER) were

promulgated under Section 36 of the *Fisheries Act* as it stood at that time.[66] The MMLER defined limits with regard to certain metals and chemicals, and with respect to pH that could not be exceeded if metal mine effluent were to be deposited into the natural environment.[67]

One of the key limits set in the 1977 MMLER was a limit on Total Suspended Solids (TSS). The limit on TSS was set at 25 mg/L[68] for monthly mean

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[66] Canada Department of Fisheries and Oceans, *Metal Mining Effluent Regulations, Regulatory Impact Analysis Statement*, Canada Gazette 135(30) (July 28, 2001). The MMLER applied to new, expanded and reopened metal mines. It did not apply to mines that commenced operations prior to 1977, to mines that had stopped operating, were orphaned or abandoned, to placer mining operations, or to mines that used cyanide in the milling process (gold mines). As such, the MMLER applied to approximately 1/3 of Canada's metal mines. While the Department of Fisheries and Oceans (DFO) is legally responsible to parliament for all sections of the Fisheries Act, Environment Canada (EC) administers those aspects of the Act in Sections 36 and 42 dealing with pollutants affecting fish as set out in a Memorandum of Understanding between DFO and EC.

Section 36 (3) of the Fisheries Act states that:

no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

However, Governor in Council may pass regulations that authorize the deposition of a deleterious substance into waters frequented by fish under section 36(4).

[67] Authorized effluent concentration limits were set for arsenic, copper, lead, nickel, radium-226, total suspended solids (TSS) and zinc, and minimum levels were set for pH. One of the key limits set in the 1977 MMLER was a limit on Total Suspended Solids (TSS).

[68] mg/L = milligrams per liter (equivalent of parts per million)

concentrations. The concentration of TSS in process wastewater (typically 200,000-600,000 mg/L) greatly exceeds this limit. This MMLER limit on total suspended solids is significant as it effectively ruled out the deposition of mine tailings into natural water bodies frequented by fish without a ministerial authorization to overrule the regulation.

In 2002 the MMLER were amended and became the *Metal Mining Effluent Regulations* (MMER).[69] At this time the limit on TSS was further reduced to 15mg/L for monthly mean concentrations. However, at the same time, a new schedule was added to the MMER. Schedule 2 of the MMER lists "tailings impoundment areas." In the MMER a "tailings impoundment area" is defined as:

> *(a) a water or place set out in Schedule 2; or*
> *(b) a disposal area that is confined by anthropogenic or natural structures or by both, but does not include a disposal area that is, or is part of, a natural water body that is frequented by fish.*[70]

Schedule 2 in essence redefines a natural water body (be it a lake, wetland or river "frequented by fish" as

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[69] In 2002, the MMER applied to 93 mines. Gold mines were included in the amended Metal Mining Effluent Regulations (MMER) of 2002, as were mines predating 1977, but not placer mines, or mines that had stopped operating, or orphaned and abandoned mines.

[70] In the 2006 MMER this definition is very slightly reworded to read: "(a) a water or place set out in Schedule 2; or
(b) a disposal area that is confined by anthropogenic or natural structures or by both, other than a disposal area that is, or is part of, a natural water body that is frequented by fish."

per section 36 of the *Fisheries Act*) as a tailings impoundment area and effectively removes it from the protections it would otherwise be afforded under the Fisheries Act and under the limits (for example on TSS) set by the Metal Mining Effluent Regulations.

B. *Stated Intent of Canadian Lake Disposal Regulation Versus its Application*

When Schedule 2 was added to the MMER, in 2002, 4 lakes and a valley of streams were listed on Schedule 2. These water bodies were all associated with existing or past mine projects. The rationale provided by Environment Canada civil servants for the addition of Schedule 2 to the MMER was legal advice they had received that operating mines using natural water bodies for tailings impoundments would be out of compliance once the new Regulations came of force unless these were covered by Schedule 2. In response to questions, Environment Canada civil servants gave assurances that it would be highly unlikely that mining companies would try to use Schedule 2 as a way to access new, as yet uncontaminated, water bodies as tailings impoundments as they would be unwilling to subject a project to the necessity of a regulatory review and amendment process and the need to get approval from Governor in Council (to amend Schedule 2 by adding another water body to it), just to secure a natural water body for a tailings impoundment.[71]

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http://www.miningwatch.ca/updir/Auditor_General_petition_Nov_13_07.pdf

Counter to the Environment Canada rationale, in 2006, two healthy fish bearing lakes were added to Schedule 2. In January of 2008, Environment Canada provided a list of an additional eight mine projects seeking to add natural water bodies to Schedule 2 and announced the department would seek to push these projects through. Environment Canada also announced that more projects would follow in 2009 as there is now a "line up" of mine projects wanting to use natural water bodies as waste disposal sites.[72]

C. *Vale-Inco Example*

Vale-Inco is currently requesting approval to use Sandy Pond (a 38 ha fish-bearing lake) in Newfoundland for the disposal of its waste from a hydro-metallurgical processing facility. This facility will process ore from Vale-Inco's Voisey's Bay nickel mine, located in Labrador. Vale-Inco has an agreement with the government of Newfoundland and Labrador that it will process its ore in Newfoundland. However, the location of the processing plant was left up to Vale-Inco to determine. Vale-Inco chose a site in Long Harbour and subsequently argued that the waste from the plant would have to be deposited in Sandy Pond as other locations, including land-based, in the vicinity of the proposed plant would not be suitable. Clearly, neither Vale-Inco nor the regulatory authorities

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[72] For a list of 11 mine projects seeking Schedule 2 amendments in the near term, provided by Environment Canada, see http://www.miningwatch.ca/index.php?/mmer/mmer coalition forming

prioritized choosing a site for the processing plant that would avoid the destruction of a natural water body for the plant's waste disposal.

The example of Vale-Inco's proposed use, and destruction, of Sandy Pond as a disposal site for its process waste is illustrative of the key determinant that is driving the preference of proposed mines in Canada, which are located near natural water bodies, to use these water bodies for their process waste disposal. In all cases brought forward to date, the cost of using a natural water body for mine waste disposal has been less expensive than providing a land-based tailings impoundment option. The price differential is significant in all cases. For Vale-Inco's Long Harbour Processing Plant the cost of building a man-made, land-based, impoundment was estimated by the company to be CAD 490 million. The costs associated with using Sandy Pond were estimated at CAD 62 million.

Environment Canada officials have repeated assurances that permission to use natural fish-bearing water bodies would be the exception, not the rule. Nonetheless, it is clear that the use of natural water bodies is now proving to be the tailings impoundment option of choice for new mines coming on line in Canada.

CONCLUSION

Allowing mill waste disposal into natural lakes would mark a stark change in U.S. Clean Water Act policy. Such disposal represents a significant threat to natural lake and river ecosystems and predictions regarding mitigation for these biological and

ecological impacts are far from precise. Thus, the lone benefit of such a change in policy is in terms of mine project economics.

It is not necessary to use natural water bodies for the disposal of mill process tailings and wastewater. Man-made structures can and have been successfully employed for this type of waste disposal, both financially and technically, for over 35 years.

The mine waste disposal in lakes situation in Canada demonstrates that mining companies will preferentially use lakes over man-made impoundments because of cost savings, and that it will be the mill process waste with the most potential to contaminate water which will be placed in these lakes.

The result of legalizing a rule to allow mill waste disposal in natural lakes, as put forth by Petitioners in this case, would have a regressive result in terms of the health and well-being of the nation's freshwater resources.

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SUPPLEMENTAL BRIEF

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Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,
Respondents.

ALASKA,
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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page(s)

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE CORPS REASONABLY DETERMINED THAT COEUR ALASKA'S DISCHARGE REQUIRED A SECTION 404 PERMIT 2

II. A SINGLE DISCHARGE CANNOT BE REQUIRED TO OBTAIN BOTH A SECTION 404 AND A SECTION 402 PERMIT 8

A. Section 402 Permits Cover "Other" Pollutants – That is, All Pollutants Except Fill Material 9

B. Land Developers Obtain Separate CWA Permits for Separate Discharges at the Same Construction Site 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 3, 9

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) 10

Kentuckians for Commonwealth Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 7

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 4

NLRB v. Food & Commercial Workers, 484 U.S. 112 (1987) 7

Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990) 2, 4

Rapanos v. United States, 547 U.S. 715 (2006) 11, 12

TABLE OF AUTHORITIES *(cont.)*

Page(s)

Statutory Provisions

5 U.S.C. § 706(2)(A) 2

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* (Clean Water Act):

33 U.S.C. § 1251(a) 13

33 U.S.C. § 1311(a) 9

33 U.S.C. § 1342(a)(1) 9

33 U.S.C. § 1344(a) 5

33 U.S.C. § 1344(c) 7

Regulations

33 C.F.R. § 323.2(c)(1) 4, 5

33 C.F.R. § 323.2(f) 5

40 C.F.R. § 122.26(a)(1) 11

40 C.F.R. § 122.3(b) 10

40 C.F.R. § 232.2 5

40 C.F.R. § 440.104(b) 4

Federal Register Notices

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (May 9, 2002) 12

TABLE OF AUTHORITIES *(cont.)*

Page(s)

OTHER

Br. of *Amicus Curiae* NAHB Supporting Pet'rs, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* Nos. 07-984, 07-990 (S. Ct. filed Sept. 24, 2008) ..... *passim*

Br. for the Fed. Resp'ts Supporting Pet'rs, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* Nos. 07-984, 07-990 (S. Ct. filed Sept. 17, 2008) 6

Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,* 42 Nat. Resources J. 59 (2002) 12

SUMMARY OF ARGUMENT

As NAHB asserted in its initial *amicus curiae* brief,[1] whether a single discharge of pollutants must be authorized by a Clean Water Act (CWA) section 404 permit, or a section 402 permit, depends on the type of pollutant at issue. Section 404 applies to discharges of "dredged or fill material," while section 402 reaches "any" other pollutant. It would contravene the CWA's structure, and upset years of regulatory implementation and landowner expectations, to now suddenly require that a *single* discharge of pollutants must be covered by *both* a section 402 *and* 404 permit.

When dirt and sediment are involved, it is within the expertise of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to decide if the discharge is "dredged or fill material" or "any" other pollutant, and concomitantly which permit program applies. Here, the Corps decided that Coeur Alaska's discharge required a section 404 permit, and the court of appeals should have deferred to that reasonable determination. Moreover, in the regulatory review process leading up to the Corps's

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[1] Letters of consent are on file with the Clerk regarding NAHB's filing of its initial *amicus curiae* brief, and the Clerk has informed NAHB's counsel that those consents are applicable to this supplemental brief. Pursuant to Rule 37.6 of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. NAHB's interest in this case remains as stated in its initial *amicus curiae* brief.

issuance of the section 404 permit, EPA had ample opportunity to comment that the discharge should have been permitted through a section 402 permit that would have triggered its performance standard for froth-flotation mill operations. Indeed, EPA had the statutory authority under section 404(c) to veto the Corps's permit altogether. But EPA did not, so deference is due to the Corps's reasonable decision that a section 404 permit was necessary regarding the discharge at issue.

ARGUMENT

I. THE CORPS REASONABLY DETERMINED THAT COEUR ALASKA'S DISCHARGE REQUIRED A SECTION 404 PERMIT.

The Court's order of May 4, 2009, directed the parties and *amici* to file supplemental briefs addressing several additional questions. The first question is:

> If the discharge of the slurry into the lake would violate Section 301 or Section 306 of the Clean Water Act, would that future violation authorize a court to set aside the permits issued by the United States Army Corps of Engineers, and the Record of Decision issued by the United States Forest Service, as "not in accordance with law," 5 U.S.C. §706(2)(A)? See *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990).

The quick answer to that question is: No, a reviewing court should not be authorized to set aside the Corps 404 permit – especially when EPA does not intervene to require a section 402 permit to cover the discharge, and thereby trigger any applicable section 301 effluent limitation guideline or section 306 new source performance standard.

As NAHB concluded in its initial *amicus* brief, "this case boils down to agency deference." Brief of *Amicus Curiae* NAHB Supporting Pet'rs at 10, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, Nos. 07-984, 07-990 (S. Ct. filed Sept. 24, 2008) ("NAHB Initial AC Brief"). If Congress's intent is not clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In this regard, the CWA is clear that coverage under only one permit program – either section 402 or 404 – is needed to authorize a single pollutant discharge. *Infra* at 8-10; NAHB Initial AC Br. at 3-14. This is a *Chevron* "step 1" question. However, it is a "step 2" question as to which permit program should apply to cover a specific discharge. Deference is due to the expert decisions by the Corps (and EPA) as to whether the pollutant discharge at issue is best categorized as "fill material" or any "other" pollutant.

In the case at hand, the Corps permissibly construed section 404, the specific provision it was charged by Congress to administer, and applied its implementing regulations accordingly. The Corps did not act arbitrarily by failing to take sections 301 and 306 into account – which are administered by EPA

and within EPA's expertise to apply and interpret. Plainly, the *Corps* lacks expertise and has no power to enforce *EPA's* performance standard, promulgated under section 306 and incorporated into a section 402 permit, regulating process wastewater from froth-floatation operations.[2] See *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990) (explaining that an agency decision is not invalid for failing to consider laws in which it has no expertise).

In most situations, there will be little dispute as to whether a discharger must obtain either a section 402 or 404 permit. For example, if the discharge will create dry land in an area that was previously a CWA "navigable water," then the discharge will be deemed fill material and a section 404 permit must be obtained. 33 C.F.R. § 323.2(e)(1); *infra* at 10. However, as illustrated by this case, sometimes it is not simple to determine whether a single discharge is dredged or fill material (such that section 404 controls) or another pollutant (such that section 402 controls). In those instances, the expert agencies must make a determination and the court should defer to "the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

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[2] EPA's performance standard states: "Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores." 40 C.F.R. § 440.104(b)

In this case, the Corps received a section 404 permit application to discharge mine tailings. It accordingly had to decide whether the discharge fell within the definition of "dredged or fill material." 33 U.S.C. §1344(a). Its definition of "fill material," which closely tracks EPA's definition, provides:

> The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.

33 C.F.R. § 323.2(e)(1) (Corps regulation); 40 C.F.R. § 232.2 (EPA regulation). Furthermore, the Corps's definition of "discharge of fill material" also closely tracks EPA's definition, stating:

> The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: ... *placement* of overburden, slurry, or tailings or similar mining-related materials ....

33 C.F.R. § 323.2(f) (emphasis supplied) (Corps regulation); 40 C.F.R. 232.2 (EPA regulation). Based on the authority conferred by section 404, the Corps rationally applied these regulations, decided that the mine tailings were "placed" at a "specified disposal site," and concluded that Coeur Alaska needed a permit for the "discharge of fill material." This reasonable agency decision warrants judicial deference.

Moreover, the Corps did not decide alone whether a section 404 permit was appropriate in these circumstances. EPA was involved at every stage. According to the plaintiff's complaint:

> In May 2004, the *agencies decided* that the mine tailings should be deemed "fill material," and the Corps would regulate Coeur Alaska's discharge of the processed mine waste from the milling facility into Lower Slate Lake pursuant to section 404 of the Clean Water Act. EPA would regulate the discharges from Lower Slate Lake into waters below the lake pursuant to section 402 of the Act.

(Compl. ¶ 39. (emphasis supplied)). As the Federal Respondents' merits brief reports, EPA was one of the "cooperating agencies" that issued a final supplemental environmental impact statement addressing different sets of project alternatives, it identified "Alternative A as the environmentally preferable alternative," and it provided "comments" on a "detailed analysis of the alternatives ...." Br. for the Fed. Resp'ts Supporting Pet'rs, at 8-9 (S. Ct. filed Sept, 17, 2008).

Despite EPA's involvement in reviewing Coeur Alaska's discharge, EPA never exercised its prerogative to prohibit that activity. Section 404(c) provides that EPA is:

> authorized to deny or restrict the use of any defined area for specification ... as a disposal site, whenever [it] determines ... that the discharge of [fill] material into such area will

> have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ..., wildlife, or recreational areas. Before making such determination, [EPA] shall consult with [the Army].

33 U.S.C. § 1344(c). Under this section, "the EPA can veto the Corps' permit." *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003). Thus, in the context of considering Coeur Alaska's project, EPA had authority to veto the Corps's permit, decide that a section 402 permit was better suited to cover the discharge into Lower Slate Lake, and make applicable its section 306 performance standard regulating wastewater from froth floatation processes through the section 402 National Pollutant Discharge Elimination System (NPDES) program. Just because EPA never pursued this veto path or required a 402 permit does not render the Corps's issuance of the 404 permit unreasonable.

Thus, based on the definitions of "fill material" and "discharge of fill material" – which address the specific activity at hand and which the Corps has the expertise to implement – and after coordinating with EPA, the Corps appropriately concluded that Coeur Alaska's discharge required section 404 authorization. The Corps's permit decision was "rational and consistent with the statute." *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987).

II. A SINGLE DISCHARGE CANNOT BE REQUIRED TO OBTAIN BOTH A SECTION 404 AND A SECTION 402 PERMIT.

The Court's next questions from the May 4, 2009, order are:

> If a discharge comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material, may the discharger obtain permits under both Section 402 and Section 404 of the Clean Water Act? Must the discharger do so?

The quick answer to these questions is: No, the agencies cannot request or require a discharger to obtain *both* a section 402 *and* a section 404 permit for a *single* discharge.

NAHB respectfully submits that the agencies must determine whether a given discharge is "dredged or fill material" or "any" other pollutant. See NAHB Initial AC Br. at 3-14 (fill covered by section 404 is "placed" at "specified disposal sites"; sediment that settles to the bottom of or remains suspended in a waterbody is "any" other pollutant covered by section 402). The agencies are best suited to decide whether a discharge of solid material in any specific instance is either "fill material" or "any" pollutant. If they determine the discharge is dredged or fill material, then *only* section 404 applies. If, on the other hand, they determine that the discharge is some other pollutant, then *only* section 402 applies.

A. Section 402 Permits Cover "Other" Pollutants – That is, All Pollutants Except Fill Material.

Agencies and the courts must give effect to clearly expressed congressional intent. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The CWA is clear that a person *cannot* obtain both a section 402 and a section 404 permit for a single discharge.

Section 301(a) makes it unlawful to discharge any pollutants unless done in compliance with numerous sections of the Act, including sections 402 and 404. 33 U.S.C. § 1311(a). Section 402 begins: "*Except as provided in section[] ... [404]* of this title, the Administrator may ... issue a permit for the discharge of any pollutant, or combination of pollutants ...." *Id.* at § 1342(a)(1) (emphasis supplied). Section 402, therefore, is the backstop. EPA may issue a section 402 permit for a discharge, except if section 404 applies. In other words, the Administrator has no authority to issue a section 402 permit if section 404 is otherwise applicable. The statute is unequivocal in this regard. NAHB Initial AC Br. at 3-6. EPA's regulations interpret the statute in like manner. They provide:

> The following discharges do not require NPDES permits:
>
> . . . .
>
> (b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of [the] CWA.

40 C.F.R. § 122.3(b); see also *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004) (developing the same paradigm in reliance on a joint EPA, Corps *amicus* brief).

Thus, the CWA and implementing regulations are clear: if a person discharges dredged or fill material, then that person must *only* procure a section 404 permit. In the case at hand, once the Corps concluded that Coeur Alaska's discharge was fill material, and EPA did not veto the Corps permit, then neither agency had any authority to require a section 402 permit for the discharge.[3]

B. Land Developers Obtain Separate CWA Permits for Separate Discharges at the Same Construction Site.

The residential land development process provides an example where the agencies have decided to require *separate* CWA permits for *separate* discharges at a *single* site – based on the nature of the pollutants being discharged.

To create homes, roads and infrastructure, NAHB's members must alter raw land. It is quite common for a parcel to contain small hydrologic features, such as ditches, ponds or wetlands, that must be filled to make the project viable. For example, previously farmed property will often contain ponds and ditches that were used for irrigation. Because of the Corps's and EPA's

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[3] Of course, the Respondents never challenged EPA for failing to issue a section 404(c) veto in this case. They sued only the Corps and the Forest Service.

expansive definition of the term "the waters of the United States," the agencies often proclaim that these features are within CWA jurisdiction. See *Rapanos v. United States,* 547 U.S. 715 (2006) (plurality). Thus, the Corps frequently requires the developer to obtain a section 404 permit before filling or dredging these features.

The land development process also implicates EPA's NPDES section 402 stormwater program. When rainwater falls onto disturbed land, the storm runoff may transport sediment offsite and into "the waters of the United States." Therefore, EPA requires that any construction site in the nation larger than one acre must obtain section 402 permit coverage before development commences. See 40 C.F.R. § 122.26(a)(1), (9) (providing that stormwater permits are required for both industrial construction sites and small construction sites.) To comply with EPA's NPDES permit for construction activities, developers utilize best management practices such as sediment basins and silt fences. In all but four states[4] and the District of Columbia, section 402 stormwater permits are obtained from the delegated state.

Thus, it is not uncommon for one project to obtain both a section 404 and a section 402 permit. However, it is important to recognize that these permits are obtained for *separate* discharges – one for the fill activity, and one for the stormwater runoff. For a construction project, the government has *never*

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[4] Alaska, Massachusetts, New Hampshire, and New Mexico.

required two permits for a single discharge, or issued a single permit that covers an entire project.

Frankly, NAHB fears a ruling in this case that would lead to a "creative" interpretation that stormwater containing sediment – which EPA has always treated as "any" pollutant – is now also "fill material," because some sediment will eventually settle out and thereby raise the bottom of the receiving water.[5] To date, the agencies have determined that this type of stormwater discharge is not fill material, and thus does not require a section 404 permit. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002).

The CWA's permit programs are bureaucratic and expensive enough as it is.[6] The Court should direct the agencies to decide which permit program applies to a given discharge. However, it would contravene the CWA's structure and years of agency practice to now burden a landowner to comply with multiple

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[5] See NAHB Initial AC Br. at 12, n. 9 (providing references that sediment can settle to the bottom of receiving waters).

[6] "The average applicant for an individual [404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes .... 'Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.'" *Rapanos*, 126 S.Ct. at 2214 (plurality) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74-76, 81 (2002)).

permits for a single discharge. Surely, the CWA's purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. § 1251(a)), can be achieved if the agencies just do their job and decide which permit program best applies to a pollutant discharge. See NAHB Initial AC Br. at 17-34 (discussing myriad standards, procedures and mechanisms inherent in the section 404 permitting process to protect aquatic resources).

Accordingly, NAHB respectfully suggests that there should be no requirement (or "voluntary" suggestion) that a discharger must (or may) obtain two different permits, from two different issuing agencies, for the *same* discharge.

CONCLUSION

For the foregoing reasons, and for the reasons provided in NAHB's Initial AC Brief, the judgment below should be reversed.

May 15, 2009

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SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER COEUR ALASKA, INC.

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RULE 29.6 STATEMENT

The corporate disclosure statement included in Coeur Alaska's petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

SUPPLEMENTAL BRIEF FOR PETITIONER COEUR ALASKA, INC. 1

I. THE CLEAN WATER ACT ESTABLISHES TWO MUTUALLY EXCLUSIVE PERMITTING REGIMES 1

II. THE CORPS ISSUED ITS SECTION 404 PERMIT TO COEUR "IN ACCORDANCE WITH LAW" 7

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins,
519 U.S. 452 (1997) 3

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 15

FCC v. NextWave Personal Communications Inc., 537 U.S. 293 (2003) 10, 11, 12

Long Island Care at Home Ltd. v. Coke,
551 U.S. 158 (2007) 3, 15

Montclair v. Ramsdell,
107 U.S. 147 (1883) 4

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) ..... *passim*

Rapanos v. United States,
547 U.S. 715 (2006) 4

United States v. Menasche,
348 U.S. 528 (1955) 4

Wong Yang Sung v. McGrath,
339 U.S. 33 (1950) 10

Statutes

5 U.S.C. § 706(2)(A) 10

11 U.S.C. § 525(a) 11

16 U.S.C. § 551 17

33 U.S.C. § 1311(a) 2

33 U.S.C. § 1316(e) 7, 9, 12

33 U.S.C. § 1342(a)(1) 3

33 U.S.C. § 1344 12

Regulations

33 C.F.R. § 230.10 .....13, 14, 15

33 C.F.R. § 230.10(b) 13

33 C.F.R. § 320.4 12

33 C.F.R. § 323.6 12

36 C.F.R. pt. 228, Subpart A 17

40 C.F.R. § 122.1(b) 6

40 C.F.R. § 122.2 5

40 C.F.R. § 122.3(b) 2, 3, 6, 15

40 C.F.R. § 230.10 .....9, 12, 13, 15

40 C.F.R. § 231.1 12

40 C.F.R. § 401.10 .....8, 15

40 C.F.R. § 401.12 9

40 C.F.R. § 440.104(b)(1) 8

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (2002) 1, 2, 8, 15

Other Authorities

118 Cong. Rec. 36,777 (1972) 5

S. Rep. No. 92-1236 (1972) (Conf. Rep.) 4

Senate Consideration of the Report of the Conference Committee (1972), *reprinted in* 1 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1972) 4

SUPPLEMENTAL BRIEF FOR PETITIONER COEUR ALASKA, INC.

Pursuant to this Court's order of May 4, 2009, Petitioner Coeur Alaska, Inc. ("Coeur") respectfully submits that both of the questions posed by the Court must be answered in the negative. Because the second question is fundamental to the administration of the Clean Water Act, and because its answer deeply undermines the premise embedded in the Court's hypothetical first question, Coeur begins by responding to the Court's second question.

I. THE CLEAN WATER ACT ESTABLISHES TWO MUTUALLY EXCLUSIVE PERMITTING REGIMES

The answer to the Court's second question is "no." A discharger may not obtain permits under both Section 402 and Section 404 of the Clean Water Act for a single discharge that "comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material." Order of May 4, 2009 (Question 2). Under the Act, a single discharge may be permitted under *either* Section 402 *or* Section 404—*never* both. And as EPA and the Corps explained in the published 2002 Fill Rule, after notice and public comment, "EPA has *never* sought to regulate fill material under effluent guidelines"—which is to say, under "[e]ffluent limitation guidelines and new source performance standards . . . promulgated under section 304 and 306 of the CWA," which "are incorporated into permits issued *under section 402 of the Act*." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (2002) (emphasis added).

1. Unless specifically excepted by the Act, any and every discharge of a pollutant into waters of the United States must be permitted either by EPA under Section 402 or by the Corps of Engineers under Section 404. *See* 33 U.S.C. § 1311(a); 67 Fed. Reg. at 31,134 ("the discharge of any pollutant into jurisdictional waters is prohibited under CWA section 301 except in accordance with a permit under sections 404 or 402"). In this litigation, respondents have maintained that the Kensington Mine tailings slurry is a discharge that "comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material," and accordingly may be permitted, if at all, only by EPA under Section 402. *See* SEACC Br. 21-23, 35-38. Petitioners and the permitting agencies, on the other hand, have argued that any discharge that "satisfies the definition of fill material"—which Coeur's tailings slurry indisputably does—"are subject only to the Section 404 permitting process." *See, e.g.*, Fed. Resp'ts Br. 14. But *all* parties have agreed that a single discharge may be permitted only under one provision or the other—never both. *See, e.g.*, SEACC Br. 38 ("a person with a valid section 404 permit need not obtain a section 402 permit for the same discharge, because section 402 applies only '[e]xcept as provided in sections [318 and 404]'").

Even if the parties were not in agreement, EPA's settled view that discharges satisfying the definition of fill material may be permitted only by the Corps under Section 404 of the Act would command controlling deference. Interpreting the Act's dual permitting schemes after notice and comment, EPA promulgated a regulation excluding "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404" from

its Section 402 permit program. 40 C.F.R. § 122.3(b). And interpreting that regulation as it applied to the specific discharge of fill material at issue in this case, three directors of EPA's Office of Water wrote in the Mine Tailings Memorandum that "the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards . . . do not apply to the placement of tailings into the proposed impoundment. *See* 40 C.F.R. § 122.3(b)." J.A. 144a-45a; *see also id.* at 74a ("EPA is the agency assigned responsibility for administering Section 402, and under the existing EPA definition [of fill material], material that has the effect of fill, regardless of the purpose of the discharge, is deemed fill material, and as such is not regulated under the Section 402 program" (emphasis omitted)). EPA's interpretation of its own regulation as precluding the permitting of discharges of fill material under Section 402 is "controlling," *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 171 (2007), as are the government's subsequent reaffirmations of that position in its briefs in this Court, *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

2. Moreover, the expert agencies' interpretation of the Clean Water Act's regulatory scheme is amply supported by the text and history of the Act.

The prefatory clause of Section 402 states that, "*[e]xcept* as provided in section[] . . . [404]," EPA "may . . . issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1) (emphasis added). This is a clear textual signpost that EPA's authority to "issue a permit" does not extend to any situation "provided in section[] . . . [404]." *Id.* And, not surprisingly, when this Court recently examined the interplay between Sections 402 and 404, it concluded

that Section 404 established "a *separate* permitting program" for discharges of dredged or fill material—not an additional program. *Rapanos v. United States*, 547 U.S. 715, 744 (2006) (plurality op.) (emphasis added); *see also id.* at 760 (Kennedy, J., concurring) ("*[a]part from* dredged or fill material, pollutant discharges require a permit from [EPA]" (emphasis added)).

"It is [this Court's] duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Yet, to conclude that EPA may issue permits for discharges of fill material strips the "[e]xcept as provided" clause of Section 402(a) of all meaning and effect.

It also contravenes Congress's plain intention in amending the legislation to include Section 404 and the "except as provided" clause of Section 402(a). As discussed in Coeur's opening brief (at 29-31), after the Senate passed its version of the bill, the House of Representatives added Section 404 to the bill and attached the "except as provided" clause to Section 402(a) in order to provide for "a separate permit program for the discharge of dredged or fill material" to be "administered by the Secretary of the Army, acting through the Chief of Engineers." S. Rep. No. 92-1236, at 141 (1972) (Conf. Rep.). After the conference committee accepted the House's changes, the Senate Report, reviewing the conference bill, observed that the House's amendments had "not only established a different set of criteria to determine the environmental effects of dredged spoil disposal but also designated the Secretary of the Army rather than the Administrator of the Environmental Protec-

tion Agency as the permit issuing authority." Senate Consideration of the Report of the Conference Committee (1972), *reprinted in* 1 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1972). The effect of the House amendments was confirmed by the Acting Administrator of EPA, who explained that, under the enrolled bill, "[t]he Corps shall continue to issue dredge and fill permits in accordance with criteria comparable to the EPA ocean discharge criteria"—which is to say the Section 404(b)(1) guidelines—rather than the technology-based limits Congress directed EPA to promulgate for other discharges. 118 Cong. Rec. 36,777 (1972).

The text and history of the Act thus validate the agencies' longstanding view that the Corps—not EPA—has authority to issue permits for discharges of fill material.

3. The mere fact or assumption that a discharge of fill material "comes within the scope of [EPA's] effluent limitations" would not present grounds for creating an exception to this established practice. As an initial matter, Coeur is unaware of any instance when the agencies have divided a single discharge from a point source into components and regulated the "fill" component under Section 404, and the liquid "effluent" component under Section 402. To the contrary, the agencies' shared and consistent practice has been to evaluate a particular point source's emissions into waters of the United States as a single, indivisible discharge, and to assign permitting authority over that discharge depending on whether the discharge, as a single indivisible unit, satisfies the definition of fill material. *See* 40 C.F.R. § 122.2 (defining "discharge of a pollutant" to mean "[a]ny

addition of any 'pollutant' *or combination of pollutants* to 'waters of the United States' from any 'point source'" (emphasis added)); *id.* § 122.1(b) (requiring Section 402 "permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States'"); *id.* § 122.3(b) (excluding "[d]ischarges of . . . fill material . . . which are regulated under section 404" from EPA's Section 402 permit program).

If there were a type of discharge that could be subject to permitting under both Section 402 and Section 404, that exception could not be limited to discharges that satisfy the definition of fill material but also come within the scope of EPA effluent limitations. This is because the Section 402 program is not limited simply to discharges that come within the scope of EPA effluent limitations, but rather applies to *all* discharges of *any* pollutant, unless specifically excluded. If the "except as provided" clause of Section 402(a) and the regulatory exclusion found in 40 C.F.R. § 122.3(b) are insufficient to exclude from Section 402 regulation of those discharges of fill material that come within the scope of EPA effluent limitations, then they are insufficient to exclude *any* discharge of dredged or fill material from regulation by EPA under its Section 402 NPDES permit program. *All* discharges of dredged or fill material would be subject to permitting under both regimes.

That result, however, simply cannot be reconciled with Congress's decision, as clearly reflected in both the text and history of the Act, to regulate discharges of dredged or fill material not through EPA's NPDES permit program of technology-based effluent restrictions, but rather through the Corps' Section 404 program under the Section 404(b)(1) water-quality and aquatic-effects guidelines developed by EPA and sub-

ject to EPA's ultimate veto authority under Section 404(c). That congressional choice is also reflected in the agencies' regulations and consistent practice, and it dictates that discharges of dredged or fill material be regulated only under Section 404.[1]

II. THE CORPS ISSUED ITS SECTION 404 PERMIT TO COEUR "IN ACCORDANCE WITH LAW"

The answer to the Court's first question also is "no."

1. The first question requires the parties to assume that the "discharge of the slurry into the lake would violate Section 301 or Section 306 of the Clean Water Act." Order of May 4, 2009 (Question 1). In this Court, SEACC has contended only that Coeur's discharge would violate Section 306(e) of the Act. *See* SEACC Br. 38-39 (abandoning the contention that discharge permitted by Corps would violate Section 301). As Coeur explained in its reply brief, however, Section 306(e) itself does not prohibit any particular discharge. Rather, Section 306(e) provides that "it shall be unlawful for any owner or operator of any new source to operate such source *in violation of any standard of performance applicable to such source*." 33 U.S.C. § 1316(e) (emphasis added).

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[1] While the discharge of a tailings slurry into the Lower Slate Lake impoundment is subject only to permitting under Section 404, as set forth in prior briefing, *see* Coeur Br. 20, the Kensington project did obtain an EPA Section 402 NPDES permit for points of discharges of effluents into downstream waters, including the discharge of effluent *from* the impoundment into the downstream creek. This permit properly applies Section 306(e) performance standards to that discharge and ensures the protection of downstream waters. J.A. 317a-31a.

SEACC charges that Coeur's discharge would violate EPA's performance standard for gold ore froth-flotation mills, *see* 40 C.F.R. § 440.104(b)(1), and thus is made unlawful by Section 306(e) of the Act. *See* SEACC Br. 24-25. Yet, EPA has always provided that point sources need to comply with Section 301 effluent limitations and Section 306 performance standards only "where applicable." 40 C.F.R. § 401.10. And in the 2002 Fill Rule, EPA *rejected* a proposed exclusion from the definition of fill material of "discharges covered by . . . effluent limitations guidelines and standards under sections 301, 304, or section 306 of the Clean Water Act" precisely because its Section 301 effluent limitations and Section 306 performance standards are inapplicable to discharges of dredged or fill material. *See* 67 Fed. Reg. at 31,135. Likewise, in the 2004 Mine Tailings Memorandum, EPA explained that the performance standard invoked by SEACC did not apply to the proposed Kensington tailings discharge. J.A. 144a-45a.[2] Against this background, the Kensington tailings slurry could possibly violate Section 306(e) *only* if EPA, in holding that its technology-based effluent limitations and performance standards were inapplicable to the Kensington discharge, had unreasonably interpreted its own regulations.

Coeur submits that Congress's decision—discussed *supra*—to specifically exclude discharges of dredged or fill material from EPA's Section 402

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[2] The Memorandum further explained that its analysis focused solely on the Kensington proposal and comparable proposals regarding discharge of mine tailings into impoundments designed to hold such materials, as opposed to open water disposal or other types of proposals. J.A. 142a n.1.

NPDES permit program and to regulate those discharges under Section 404 of the Act according to Section 404(b)(1) guidelines means that EPA's conclusion that its Section 301 effluent limitations and Section 306 performance standards are inapplicable to discharges of fill material is not only reasonable, but compelled by the plain terms of Section 404 of the Act. If EPA held that those types of effluent restrictions, both of which assign and calibrate limits solely by reference to *technological feasibility*, *see* 40 C.F.R. § 401.12, applied to discharges of dredged or fill material, it would completely abnegate Congress's decision to regulate those discharges under a very different set of criteria—the Section 404(b)(1) guidelines, which are developed by EPA principally by reference to the water-quality and other aquatic *effects* of the discharge, *see* 40 C.F.R. § 230.10. EPA's conclusion that its froth-flotation performance standard did not apply to the proposed Kensington tailings slurry, *see* J.A. 144a-45a, thus was reasonable and correct. And because there is no "violation of any standard of performance," there could be no violation of Section 306(e). 33 U.S.C. § 1316(e).

2. The Court's first question, however, does suggest a possible basis for reversing the judgment of the court of appeals without resolving definitively the question whether Coeur's proposed placement of a tailings slurry would violate Section 301 or 306 of the Act: Whatever a reviewing court might conclude with respect to the reasonableness of EPA's interpretation of its own performance standard, the Corps did not act contrary to law by abiding by its authorizing statute and regulations and otherwise deferring to EPA's interpretation of its own regulations.

a. Congress adopted the Administrative Procedure Act "to introduce greater uniformity of procedure and standardization of administrative practice" and "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). As part of this effort to regularize the agency decision-making process and subject that process to judicial oversight, Section 706(2)(A) allows a reviewing court to set aside an agency's action if that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

SEACC's view apparently is that an agency acts "not in accordance with law" whenever its action mandates, permits, or otherwise encourages public or private conduct that violates some provision of positive law. But this Court's decisions in *Pension Benefit Guaranty Corporation v. LTV Corporation*, 496 U.S. 633 (1990), and *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003), demonstrate that the APA's mandate that agencies act "in accordance with law" is not nearly so sweeping.

In *LTV*, the court of appeals had held that the PBGC violated Section 706(2)(A) of the APA by failing "to take account of all the areas of law that the court deemed relevant" to the PBGC's decision to restore a pension plan it previously had terminated. 496 U.S. at 645. Though all agreed that the PBGC's restoration powers were vested and circumscribed only by ERISA, the court of appeals held that "because labor law and bankruptcy law" also were "involved in the case at hand, the PBGC had an affirmative obligation" to consider those other provisions of law. *Id.* (internal quotation marks omitted).

This Court reversed. Given ERISA's "unambiguous statutory mandate" authorizing the agency to restore a terminated plan only "when restoration would further the interests that Title IV of ERISA is designed to protect," the Court did "not think that the PBGC did or could focus 'inordinately' on ERISA in making its restoration decision." *Id.* at 645-46. The Court further observed that, "[i]f agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy . . . then a very large number of agency decisions might be open to judicial invalidation." *Id.* at 646.

In *NextWave*, this Court encountered the converse situation. Rather than a demand that the agency comply with every "arguably relevant statutory policy," *LTV*, 496 U.S. at 646, the contention in *NextWave* was that the agency had violated a statute that directly regulated its conduct as an agency. After NextWave filed for bankruptcy, the FCC cancelled its licenses for nonpayment; NextWave argued that in revoking its licenses, the FCC had violated Section 525(a) of the Bankruptcy Code, which provided that "a governmental unit may not . . . revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . ." 11 U.S.C. § 525(a). This Court concluded that the FCC's license revocation violated the statute. And because that statute "circumscribe[d] the Commission's permissible action," the agency's action in contravention of the statute violated the APA. 537 U.S. at 304.

Thus, the lesson of *LTV* and *NextWave* is that while an agency need not consider and heed every "arguably relevant statutory policy," its actions will be found "not in accordance with law" when it vio-

lates statutes or regulations that directly circumscribe its primary conduct.

To demonstrate that the Corps' issuance of the Section 404 permits at issue in this case was "not in accordance with law," SEACC would need to point to some statute or regulation circumscribing the Corps' conduct as an agency with which it failed to comply. Here, SEACC has failed to identify any such statute or regulation. Section 306(e) certainly is not such a provision; where applicable, it regulates only the conduct of the "owner or operator of any new source." 33 U.S.C. § 1316(e). In contrast to the statute that directly prohibited the agency action at issue in *NextWave*, Section 306(e) does not make any of the Corps' regulatory conduct unlawful.

b. SEACC might turn to the statutes and regulations governing the Section 404 permitting process, but SEACC has never asserted that the Corps' permitting process failed to comply with Section 404, *id.* § 1344, the Section 404(b)(1) guidelines developed by EPA, *see* 40 C.F.R. § 230.10, or the Corps' general permitting procedures, *see* 33 C.F.R. §§ 320.4, 323.6. As described in Coeur's opening brief (at 18-21), that permitting process was robust and extremely rigorous, taking into account water-quality and other aquatic-ecosystem effects, fish and wildlife, historic, cultural, scenic, and recreational values, the safety of impoundment structures, economic impacts, and mitigation measures, and it resulted in a substantial record of decision. J.A. 340a-433a. And at the conclusion of that process, EPA, finding that the proposed placement of tailings threatened no unacceptable adverse impact on the aquatic environment, declined to exercise its veto power under Section 404(c). *See* 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1. SEACC

challenged *none* of those findings below; its only contention in this Court has been that Section 306(e) itself prohibits the Corps from issuing a permit. Because Section 306(e) does not operate on the Corps, that contention fails. That is a sufficient basis for reversal of the judgment of the court of appeals.

c. Although SEACC has not previously advanced the argument, it may now contend that if (contrary to EPA's interpretation of its regulations) Section 301 effluent limitations and Section 306 performance standards do apply to discharges of dredged or fill material, then the Corps was required to consider those effluent restrictions and incorporate them into its permitting process, and that failure to do so constituted agency action "not in accordance with law." For at least two reasons, this contention also must fail.

First, the Section 404(b)(1) guidelines developed by EPA spell out in rich detail the considerations and requirements the Corps must observe in deciding whether to issue a Section 404 permit. *See* 33 C.F.R. § 230.10. Those guidelines prohibit the issuance of a permit in many circumstances: if the discharge violates "any applicable State water quality standard," "any applicable toxic effluent standard or prohibition under section 307 of the Act," "any requirement imposed by the Secretary of Commerce to protect any marine sanctuary," and other legal requirements. *Id.* § 230.10(b). And yet, though the Section 404(b)(1) guidelines, like the authorizing statute at issue in *LTV*, "do take account of other areas of federal law," 496 U.S. at 646 n.7, they nowhere mention Section 301 effluent limitations or Section 306 performance standards. And though it is true that the 404(b)(1) guidelines include a parenthetical note cau-

tioning that "other laws may apply to particular discharges" and that accordingly every "discharge complying with the requirement of these Guidelines will not automatically receive a permit," 33 C.F.R. § 230.10 (note), SEACC itself has argued that the Corps is incompetent to apply Section 301 effluent limitations or Section 306 performance standards in its permitting process. *See* Oral Arg. Tr. 35 ("the Corps of Engineers just doesn't have the tools available to apply effluent limitations in its 404 permits, except for toxic substances").

The Corps hardly can be faulted for ordering its permitting decision according to the criteria spelled out in its regulations—criteria which it is competent to apply and which it indisputably applied correctly in this case—and for not taking into account considerations *not* so specified, which even SEACC contends the Corps is incapable of administering. *Cf. LTV*, 496 U.S. at 646 ("[b]ecause the PBGC can claim no expertise in the labor and bankruptcy areas, it may be ill equipped to undertake the difficult task of discerning and applying the 'policies and goals' of those fields"). The mere fact that a discharge that complies with the 404(b)(1) guidelines but to which "other laws may apply" "will not automatically receive a permit," cannot be read to mean that the Corps acts *contrary to law* whenever it grants a permit for such a discharge. The APA does not require an agency to take account of "every arguably relevant statutory policy." *LTV*, 496 U.S. at 646.

Second, the argument that the Corps should have applied EPA's froth-flotation performance standard to deny Coeur's permit is bottomed on the deeply flawed assumption that, at the time the Corps was making its permitting decisions, the Corps was free

to disregard *EPA's* authoritative interpretation of *EPA's* effluent limitations and performance standards.

In both the Fill Rule and the Mine Tailings Memorandum, EPA made clear its view that its effluent limitations, including the froth-flotation performance standard invoked by SEACC, do not apply to discharges of tailings slurry or other fill material. *See* 67 Fed. Reg. at 31,135; J.A. 144a-45a. This interpretation of its regulations stems from EPA's long-held view that its technology-based effluent limitations apply only under the Section 402 NPDES permit program, *see* 40 C.F.R. § 401.10, which does not apply to discharges of fill material, *see id.* § 122.3(b), which are regulated by the Corps under Section 404, according to the very different guidelines developed by EPA pursuant to authority granted by Section 404(b)(1), *see* 33 C.F.R. § 230.10. As EPA's authoritative construction of its own regulations, a reviewing court must accord the interpretation found in the Fill Rule and the Mine Tailings Memorandum "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *see also Long Island Care,* 551 U.S. at 171.

If a reviewing court must accord "controlling" deference to an agency's interpretation of its own regulations, then surely a coordinate agency, which has no authority under the APA to review the actions of other agencies, must accord the same interpretation at least that much deference. The notion, implicit in SEACC's argument, that, to be "in accordance with law," the Corps was obligated to disregard EPA's interpretation of its effluent limitations and perform-

ance standards is irreconcilable with the general principle that the expertise an agency acquires through the administration of certain statutes and regulations commands deference from those who lack such expertise. *See LTV*, 496 U.S. at 651-52 ("This practical agency expertise is one of the principal justifications behind *Chevron* deference."). It is also irreconcilable, on a more particularized level, with SEACC's assertion that the Corps is incompetent to administer EPA's effluent limitations and performance standards. *See* Oral Arg. Tr. 35.

Certainly no less than a reviewing court, the Corps was obligated to accord substantial deference to EPA's interpretation of its own regulations expressed in the Fill Rule and the Mine Tailings Memorandum. The fact that, years after a permitting decision, a reviewing court may determine that EPA's interpretation of its regulations is unsustainable, cannot and does not mean that, years before, the only path open to the Corps—the only available course of action "in accordance with law"—was to undertake that same challenge *sua sponte* and to reach the same conclusion. If the APA does not require an agency to consider each "arguably *relevant* statutory policy," *LTV*, 496 U.S. at 646 (emphasis added), then it cannot require an agency to consider those regulations or policies that it is told, authoritatively, are *irrelevant*.

For all these reasons, the answer to the first question posed by the Court is "no," and the Court thus has available to it an avenue for reversing the judgment of the court of appeals without deciding whether EPA erred in concluding that its effluent

limitations and performance standards do not apply to discharges of tailings slurry fill material.[3]

* * *

The Corps issued a Section 404 permit for the Kensington Mine project in accordance with all of the applicable laws governing its conduct. The State of Alaska then certified that this project complied with its state water-quality standards under Section 401. EPA oversaw the entire process—from writing the 404(b)(1) guidelines, to informing the Corps that the 306(e) performance standards were inapplicable, to deciding not to veto the permit. In total, the Kensington Mine project has gone through two decades of extensive analysis and public review by several federal, state, and local agencies, including over 900 studies at a cost of $26 million. All of this led to the conclusion that the placement of the mine tailings into the impoundment was the "least environmentally damaging practicable alternative." J.A. 354a.

SEACC's attack on the Corps' decision to issue the Section 404 permit is premised on an interpretation of EPA's performance standards and Section 306(e) that EPA explicitly rejected. It would be unwarranted and unjust to strike down the permit because the Corps failed to contravene EPA's binding interpretation of EPA's own regulations and a statu-

[3] For the same reasons, this Court should reverse the court of appeals' invalidation of the Forest Service's Record of Decision ("ROD") regarding Kensington Mine operations on national forest land. The Forest Service issued its ROD pursuant to 16 U.S.C. § 551, in compliance with its governing regulations under 36 C.F.R. pt. 228, Subpart A, and in reliance on EPA's authoritative interpretation of its effluent limitations and performance standards.

tory provision that Congress charged EPA with enforcing. This would also be manifestly unfair to Coeur and the citizens of the State of Alaska, who relied on EPA's binding conclusions in collaborating to design and invest in implementing an environmentally sound, modern mineral development project, within an established mining district, in a region suffering from severe economic decline. That project stands mostly constructed and ready to proceed, but for SEACC's lawsuit and the court of appeals' actions.

It is evident that SEACC's real disagreement is with EPA's actions in interpreting Section 306(e). Yet, SEACC has not challenged EPA's Section 404(b)(1) water-quality standards, the Fill Rule, the Mine Tailings Memorandum, or EPA's decision not to veto the Corps' permit under Section 404(c). This Court should not allow SEACC to launch a backdoor challenge to EPA's expert determinations by challenging the Corps' decision to issue the Section 404 permit.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to vacate immediately the injunction pending appeal and to affirm the judgment of the district court.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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IN THE

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v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

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STATE OF ALASKA,

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SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER STATE OF ALASKA

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE CORPS ACTED IN ACCORDANCE WITH LAW	3
A. It Would Be Possible For The Court To Uphold The Corps' Permits Without Deciding The Legal Status Of The Future Discharges	3
B. The Court Should Hold That Effluent Limitations Do Not Apply To Discharges Of Fill Material	10
II. ALL DISCHARGES OF FILL MATERIAL ARE SUBJECT TO THE EXCLUSIVE PERMITTING AUTHORITY OF THE CORPS UNDER SECTION 404	13
A. A Discharge Is Subject To Only One Permitting Scheme	13
B. The Section 404(b)(1) Guidelines Rigorously Protect Water Quality	17
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 17

Cmty. Television of S. Cal. v. *Gottfried*, 459 U.S. 498 (1983) 5, 6, 9

FCC v. *NextWave Pers. Communic'ns, Inc.*, 537 U.S. 293 (2003) 8

McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944) 5, 6, 9

NAACP v. *FPC*, 425 U.S. 662 (1976) 7

Pension Benefit Guar. Corp. v. *LTV Corp.*, 496 U.S. 633 (1990) 6, 7

Rapanos v. *United States*, 547 U.S. 715 (2006) 15, 18

STATUTES:

5 U.S.C. § 706(2)(A) 3

Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816, as amended:

§ 301(e), 33 U.S.C. § 1311(e) 11

§ 306(e), 33 U.S.C. § 1316(e) 5, 10

§ 307(a)(5), 33 U.S.C. § 1317(a)(5) 5, 12

§ 307(d), 33 U.S.C. § 1317(d) 5

§ 402(a), 33 U.S.C. § 1342(a) ..... *passim*

§ 404(a), 33 U.S.C. § 1344(a) 4, 14

§ 404(b), 33 U.S.C. § 1344(b) 4

§ 404(b)(1), 33 U.S.C. § 1344(b)(1) 14
§ 404(c), 33 U.S.C. § 1344(c) 4, 16, 19

LEGISLATIVE MATERIALS:

117 Cong. Rec. S38883 (1971) 16
118 Cong. Rec. 10632 (1972) 16
S. 2770, 92nd Cong (1971) 15
S. Rep. No. 92-414 (1971) 16

REGULATIONS:

40 C.F.R. § 122.2 11
40 C.F.R. § 122.3(b) 12
40 C.F.R. § 125.4(d) (1973) 16
40 C.F.R. § 230.10(b)(2) 9, 18
40 C.F.R. § 230.10(b)(3) 9
40 C.F.R. § 230.10 19
40 C.F.R. § 230.10(a) 19
40 C.F.R. § 230.10(c) 19
40 C.F.R. § 230.11 19
40 C.F.R. § 230.71 19
40 C.F.R. § 230.72 19
40 C.F.R. Part 440, Subpart J 8
40 C.F.R. § 440.104 19

ADMINISTRATIVE MATERIALS:

38 Fed. Reg. 13,528 (1973) 16
44 Fed. Reg. 54,222 (1979) 9
51 Fed. Reg. 8,871 (1986) 16, 17
65 Fed. Reg. 21,292 (2000) 11

67 Fed. Reg. 31,129 (2002) ..... *passim*
69 Fed. Reg. 68,444 (2004) 11

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SUPPLEMENTAL BRIEF FOR PETITIONER STATE OF ALASKA

INTRODUCTION

The answer to both the Court's hypothetical questions is "no." First, the Corps acted in accordance with law when it issued its permits, regardless

of any later determination of the legal status of the future slurry discharges under Sections 301 and 306 of the CWA. That is because Section 404 is the only relevant statutory provision that governed the Corps' permitting action. And the Corps complied with every provision of Section 404 and the only regulations that apply under it, in accordance with EPA's authoritative interpretation of its own effluent limitations. Second, as all parties have agreed, a given discharge is subject to permitting either by the Corps under Section 404 (subject to a potential EPA veto) or by EPA under Section 402, but never by both agencies. *See* 33 U.S.C. § 1342(a) (EPA permitting authority applies only "[e]xcept as provided in * * * [Section 404]"). Where, as here, the discharge is of fill material, it is subject to the exclusive permitting authority of the Corps under Section 404.

It would therefore be possible for the Court to uphold the Corps' permits without deciding whether EPA effluent limitations would, or would not, apply to Coeur's future discharges. The State of Alaska, however, urges the Court to resolve the legality of the discharges in this case, and to do so by holding that EPA effluent limitations do not apply to discharges of fill material. Upholding the Corps' permits without determining whether the discharges are permissible under the CWA would subject the parties, and others in similar circumstances, to legal uncertainty that the permitting process was intended to resolve. Thus, for largely the same reasons that the Corps' permits are valid, the Court should reject the premise of the first hypothetical question and hold that the future discharges would not violate Sections 301 or 306 of the CWA.

I. THE CORPS ACTED IN ACCORDANCE WITH LAW.

As explained in its previous briefs, Alaska disagrees with the premise of the first hypothetical question, which assumes for the sake of argument that future discharges would violate Section 301 or Section 306 of the CWA. Alaska urges the Court to hold that the discharges would not violate the CWA, which would provide legal certainty to this project and to others in similar circumstances. It is, however, possible for the Court to decide this case without reaching that issue, because the Corps acted fully in accordance with law regardless of the legal status of the future discharges under statutory provisions that Congress did not direct the Corps to consider, enforce or administer.

A. It Would Be Possible For The Court To Uphold The Corps' Permits Without Deciding The Legal Status Of The Future Discharges.

As the Court's first question indicates, the issue in this case is whether the Corps acted "in accordance with law" in issuing the permits at issue. 5 U.S.C. § 706(2)(A).[1] The Corps acted lawfully, regardless of any future determination of the legal status of Coeur's discharges under Sections 301 or 306, because the Corps fully complied with each and every requirement that governed its permitting

---

[1] The question also refers to the Record of Decision ("ROD") issued by the Forest Service. Because the Corps applied the ROD in its permitting decision, JA342a, this brief refers only to the permits as encompassing all relevant final agency action being challenged. SEACC has not separately challenged the ROD before this Court.

decision under Section 404 of the CWA. Given that the statutory requirements circumscribing the Corps' permitting actions—unlike those governing EPA permitting under Section 402—do not include evaluation or application of EPA effluent limitations promulgated under Sections 301 or 306, the Corps' permits are fully in accordance with law.

The discharge at issue is conceded by all parties to be "fill material" under the applicable regulatory definition. *See* Alaska Reply Br. 3; SEACC Br. 20. Accordingly, Section 404 is the CWA provision that governed the Corps' permitting decision. Section 404 provides that the Corps "may issue permits, after notice and opportunity for public hearings for the discharge of * * * fill material." 33 U.S.C. § 1344(a). The only other statutory requirements for such permits are set forth in the remainder of Section 404. As relevant here, those provisions require the Corps to evaluate disposal sites "through the application of guidelines developed by [EPA], in conjunction with the [Corps]." 33 U.S.C. § 1344(b). Such permitting, however, is always subject to veto by EPA if it determines that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c).

Notably absent from Section 404 is any requirement that the Corps apply effluent limitations promulgated by EPA under Sections 301 or 306. This is in marked contrast with Section 402, which governs EPA permits for pollutants other than dredged or fill material and which prohibits EPA from issuing such permits unless the discharges would comply with effluent limitations. *See* 33

U.S.C. § 1342(a). Thus, even SEACC agrees that "Congress did not authorize the Corps to issue section 404 permits incorporating effluent limitations under sections 306 or 301." SEACC Br. 37. *See also* Oral Argument Tr. 35 (statement by SEACC's counsel that "the Corps of Engineers just doesn't have the tools available to apply effluent limitations in its 404 permits, except for toxic substances").

Indeed, in CWA § 307(a)(5), Congress specifically provided that one specific type of EPA effluent limitations—governing toxic pollutants not at issue here—"may" (but not must) be applied to discharges of dredged material after consultation with the Corps. *See* 33 U.S.C. § 1317(a)(5). This specific authority demonstrates that Congress did not intend that *all* effluent limitations will automatically apply to all discharges of fill material governed by the Corps under Section 404, even when the CWA provides, generally, that operation of a source in violation of the standards is unlawful. *Compare* 33 U.S.C. § 1316(e) *with* 33 U.S.C. § 1317(d) (nearly identical prohibitions on violation of effluent standards).

"[A]n agency is not automatically given 'either the duty or the authority to execute numerous other laws,'" and "an agency's general duty to enforce the public interest *does not require it to assume responsibility for enforcing legislation that is not directed at the agency.*" *Community Television of S. Cal.* v. *Gottfried*, 459 U.S. 498, 509 n.14, 510 n.17 (1983) (quoting *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944)) (emphasis added). In *Community Television*, a petitioner challenged an FCC television license renewal, alleging that the licensee would operate in violation of Section 504 of

the Rehabilitation Act by failing to accommodate the needs of deaf or hearing impaired viewers. The Court, however, upheld the renewal on the ground that, while the FCC should consider the needs of handicapped citizens, it "is by no means required to measure proposals for public television license renewals by the standards of § 504 of the Rehabilitation Act." 459 U.S. at 509 n.14. The Court did not need to decide, and did not decide, whether the licensee would in fact violate the Act.

In *McLean Trucking*, the Court similarly held that the Interstate Commerce Commission did not act unlawfully in approving a consolidation of motor carriers, notwithstanding unresolved allegations that the order authorized a violation of the Sherman Act. As the Court held, "the Commission has no power to enforce the Sherman Act as such" and "cannot decide definitely whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act." 321 U.S. at 79. Rather, the Commission's discretionary ability to consider antitrust policies "depend[s] on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned." *Id.* at 80.

Likewise, in *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 647 (1990), the Court held that the PBGC did not act unlawfully when it did not consider labor and bankruptcy laws in implementing the pension laws that the PBGC was entrusted to enforce. As the Court held, "there are numerous federal statutes that could be said to embody countless policies" and "[i]f agency action may be

disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation." *Id.* at 646. *See also NAACP* v. *FPC*, 425 U.S. 662, 671 (1976) (Federal Power Commission's authority to consider the "public interest" did not require it to enforce non-discriminatory employment practices by its licensees).

Under these precedents, a court cannot invalidate a Section 404 permit issued by the Corps as contrary to law on the ground that an applicant might subsequently violate another statute that the Corps does not enforce and that does not constrain the Corps' actions. For example, the Corps would not act unlawfully if it did not investigate whether every prospective permittee might violate minimum wage laws and then deny a permit whenever it believed a violation might later occur. The Corps need only follow the statutes that circumscribe its own actions. Here, that statute is Section 404, and it does not incorporate or require adherence to the EPA effluent limitations at issue here. Indeed, the case for upholding the Corps' actions is even stronger than it was in *Community Television*, *McLean Trucking*, and *NAACP*, because the agencies in those cases were at least subject to broad statutory public interest standards whereas the Corps is subject only to the specific standards of Section 404 and the guidelines promulgated under it.

The Corps thus acted fully in accordance with law when it carried out all its duties and responsibilities under Section 404, regardless of whether Sections 301 and 306 would, or would not, apply to future discharges. Those provisions are simply not among

the ones that Congress directed the Corps to apply or enforce. Rather, they are administered by a different agency—EPA—and EPA authoritatively informed the Corps in the context of this permitting decision that EPA's own "effluent limitations guidelines and standards, such as those applicable to gold ore mining (*see* 40 C.F.R. Part 440, Subpart J) *do not apply* to the placement of tailings into the proposed impoundment." J.A. 144a-45a (emphasis added). This statement, moreover, was consistent with EPA's longstanding recognition that it has that "*never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,129, 31,135 (2002) (emphasis added). Regardless of whether EPA's interpretation of its regulations was correct, or whether EPA might adopt a different view in future permitting decisions, it is the Corps, not EPA, that is the defendant in this action and only the Corps' actions are subject to challenge. The Corps did not act unlawfully when it faithfully followed every statutory requirement that governed its actions and accepted EPA's authoritative interpretation of the regulations that it alone wrote and administers.

To be sure, an agency is bound to follow not only its governing organic statute but also any other law that "circumscribes [the agency's] permissible action." *FCC* v. *NextWave Pers. Communic'ns, Inc.*, 537 U.S. 293, 304 (2003). That would include, for example, laws such as the Administrative Procedure Act itself, the National Environmental Policy Act, and constitutional provisions that constrain government action. But for the reasons noted above and in Alaska's prior briefs, EPA effluent limitations promulgated under Sections 301 and 306 do not circumscribe the Corps' permitting actions under

Section 404, which are governed instead by the requirements of that statute.

Moreover, as the cited precedents make clear, even where an agency is not *required* to consider alleged violations of other statutes in carrying out its own duties, it still may have the *discretion* to consider the policies underlying those other statutes. *See, e.g.*, *McLean Trucking*, 321 U.S. at 80. Thus, as noted previously (*see* Alaska Br. 29 n.6), while the Corps is not required by statute to apply EPA effluent limitations to its permitting actions, the Corps and EPA would have the future discretion to incorporate effluent limitations, where appropriate, into their Section 404(b)(1) Guidelines. *Cf. Community Television*, 459 U.S. at 510 (in renewing licenses, FCC should consider "possible relevance" of violations previously adjudicated in different proceedings). Indeed, the agencies did just that with respect to toxic effluent limitations, even though EPA never exercised its authority under CWA § 307(a)(5) to apply those limitations directly to dredged material. 40 C.F.R. § 230.10(b)(2); 44 Fed. Reg. 54,222, 54,235 (1979). And the agencies also similarly exercised their discretion to incorporate certain provisions of the Endangered Species Act into the Section 404(b)(1) Guidelines. 40 C.F.R. § 230.10(b)(3). But to date, they have never made other effluent limitations applicable as part of the Section 404(b)(1) Guidelines.

For these reasons, the Court could uphold the Corps' permits without reaching the question of whether Sections 301 or 306—which do not govern the Corps' permitting authority—would or would not apply to the subsequent discharges.

B. The Court Should Hold That Effluent Limitations Do Not Apply To Discharges Of Fill Material.

Although it would be possible for the Court to decide this case in favor of petitioners without deciding the legal status of Coeur's subsequent discharges, Alaska nevertheless urges the Court to decide that latter issue, and to do so by holding that the discharges are not subject to EPA effluent limitations promulgated under Sections 301 and 306. Leaving that issue open would perpetuate much of the legal uncertainty that currently plagues the Kensington Mine project and other projects facing similar circumstances.

If the Court upholds Coeur's permits without deciding whether subsequent discharges would violate Section 301 or 306 effluent limitations, that holding likely would not end this dispute. SEACC (or another prospective plaintiff) might try to relitigate that issue by challenging the discharges in a separate action brought under the "citizen suit" provision of 33 U.S.C. § 1365(a)(1). *See* SEACC Br. 35. A court in such an action would then have to determine whether the suit is authorized, including whether it would be barred by the "permit shield" provision of 33 U.S.C. § 1344(p). *See* Alaska Br. 32; Alaska Reply Br. 9 n.6. If the court nevertheless found the lawsuit proper, it would then likely proceed to decide whether the discharges would "violate" an "applicable" standard of performance promulgated under Section 306. *See* 33 U.S.C. § 1316(e).[2]

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[2] As noted below, there would be no conceivable basis for invoking Section 301 effluent limitations because this case does not involve an existing source.

If that subsequent litigation occurs, the Kensington project would remain in legal limbo, leaving both Coeur Alaska and the citizens of Alaska unsure as to whether the approved tailings disposal method—upon which the entire project is based—will ultimately be permissible. A main purpose of permitting schemes, like the one set forth in Section 404, is to remove such legal uncertainty and thereby provide the permittee and the public, whenever possible, with advance legal assurance. Alaska thus urges the Court to provide such assurance in this case to the extent it can. The Kensington project has been under study for almost two decades, and this litigation has already consumed four years. The prospect of yet more uncertain litigation would not be a welcome one for any of the parties.

In Alaska's view, it is not necessary to reserve the issue, because the same reasoning that underlies the Corps' lack of authority to enforce or administer EPA effluent limitations leads to the conclusion that those limitations do not apply to discharges of fill material. As explained previously, nothing in the language of Sections 301 or 306 mandates such application. Section 301(e) simply requires that effluent limitations for existing sources be applied "in accordance with the provisions of [the CWA]," 33 U.S.C. § 1311(e), yet nothing in the CWA requires that these limitations be applied to fill material. *See* Alaska Br. 33. In any event, effluent limitations promulgated under Section 301 apply only to existing sources. 69 Fed. Reg. 68,444, 68,476 (2004) ("[e]ffluent limitations guidelines for existing facilities are established under sections 301 and 304, whereas new source performance standards are established under section 306"). And because the Kensington mine would be a new source, not an existing one, *see* 40

C.F.R. § 122.2, Section 301 effluent limitations could not conceivably apply to this project.

Section 306(e) similarly provides only that a discharge may not be in "violation" of any "applicable" standard of performance promulgated thereunder. It, too, says nothing about whether such standards of performance are in fact applicable to, or could be violated by, discharges of fill material permitted by the Corps under Section 404. *See* Alaska Br. 33-34; Alaska Reply Br. 4.

When Congress wants to authorize the application of EPA effluent limitations to discharges that are otherwise exempt from them, it says so expressly. As noted, Congress expressly provided that the Corps may (but not must) apply toxic effluent limitations to dredged (but not fill) material. *See* 33 U.S.C. § 1317(a)(5). And Congress expressly amended CWA § 318, which—like Section 404—governs discharges excepted from Section 402 permitting, to require application of all EPA effluent limitations. But Congress never amended Section 404 in the same manner. *See* Alaska Br. 28; Alaska Reply 5-6.

Even if the statutes were not clear on this point, the agencies' reasonable interpretations are dispositive. In the first place, Section 306(e) does not apply solely of its own force. Rather, it merely prohibits discharges that would violate applicable *regulations* promulgated by EPA. Yet EPA has stated definitively that its *own* effluent limitations are not applicable to, and thus would not be violated by, the proposed discharges of fill material. *See* J.A. 144a-45a; 67 Fed. Reg. at 31,135; 40 C.F.R. § 122.3(b). Therefore, Section 306(e) cannot apply to this case as a matter of law because the agency with the sole authority to determine when it applies has

said that it does not. Alaska Br. 34; Alaska Reply Br. 8. In any event, the agencies' interpretation is entitled to dispositive deference under *Chevron*. *See* Alaska Br. 41-49; Alaska Reply Br. 11-14.

It is inconceivable that Congress, when it established a separate permitting scheme under Section 404 that does not require the Corps to follow EPA effluent limitations, nevertheless intended for those limitations to apply to, and prohibit, future discharges that are in full compliance with a valid Section 404 permit. Rather, the only intelligible interpretation of the statute is the one the agencies have always embraced: discharges of fill material permitted by the Corps need not comply with effluent limitations promulgated by EPA under Sections 301 and 306.

II. ALL DISCHARGES OF FILL MATERIAL ARE SUBJECT TO THE EXCLUSIVE PERMITTING AUTHORITY OF THE CORPS UNDER SECTION 404.

A. A Discharge Is Subject To Only One Permitting Scheme.

In answer to the Court's second question, if a discharge satisfies the definition of fill material, the discharger may not obtain permits under both Sections 402 and 404, but rather may (and must) obtain only a Section 404 permit from the Corps. The parties have disagreed on much in this litigation, but they have always agreed on one point: a given discharge is subject either to a Section 402 permit from EPA or a Section 404 permit from the Corps, but never both. *See* Alaska Br. 25. SEACC has conceded that point at every stage of the proceedings, from the District Court through oral

argument in this Court.[3] The parties have disagreed on *which* agency must consider this permit, but they have always agreed that only one can do so.

1. It is not surprising that SEACC has always conceded the point, because the statute, the legislative history, and the agencies' unwavering interpretations mandate it. Section 404 provides, in pertinent part, that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters" under the Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(a), (b)(1). By contrast, Section 402 provides, in pertinent part, that

> *[e]xcept as provided in section[] * * * 1344 of this title* [Section 404 of the CWA], the Administrator [of EPA] may * * * issue a permit for the discharge of any pollutant, or combination of pollutants * * * upon condition that such discharge will meet * * * all applicable

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[3] *See* Oral Arg. Tr. 27 ("[I]f you have a section 404 permit, you don't also need a section 402 permit."); SEACC Br. 7 ("If a discharge is authorized by a valid fill-material permit under section 404, a section 402 permit is not required"); SEACC Opp. Cert. 20 ("[D]ischarges subject to EPA effluent limitations may be permitted by EPA under section 402 but not by the Corps under section 404. Conversely, discharges properly permitted under section 404 do not require section 402 permits."); SEACC Ninth Cir. Reply Br. 2 ("a properly permitted discharge of dredged or fill material under section 404 does not also require a permit under section 402") (R. 54), *id.* at 3 n.2 ("a single discharge is subject to only one of these permitting programs"); SEACC Ninth Cir. Br. 24 ("a single discharge will be governed by either section 402 or section 404, but not both") (R. 28), Plaintiffs' Reply Br. on Count I at 4, No. 05-cv-00012 (D. Alas. May 18, 2006) ("[s]ection 402(a)(1) expressly excepts discharges authorized by permits under section 404 from also getting authorization under section 402") (R. 104).

> requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title.

33 U.S.C. § 1342(a) (emphasis added).

By Section 402's plain language, EPA may issue a permit for the discharge of a pollutant *"[e]xcept as provided in section [404]," i.e.*, only if the discharge is not subject to permitting by the Corps under Section 404. Because the discharges at issue are concededly of "fill material," they are subject to the Corps' exclusive permitting authority under Section 404, and are not subject to EPA's authority under Section 402. There is no other reasonable reading of Section 402: the first clause would be meaningless if EPA could issue a Section 402 permit for a discharge of fill material that is subject to a Section 404 permit. Thus, in *Rapanos* v. *United States*, 547 U.S. 715 (2006), a majority of the Court expressly recognized this basic division of permitting responsibilities. *See id.* at 744-45 (Section 404 is a "separate permitting program" from Section 402) (plurality); *id.* at 760 (*"[a]part from dredged or fill material*, pollutant discharges require a permit from the Environmental Protection Agency") (Kennedy, J., concurring) (emphasis added).

2. Although the statute is unambiguous on this point, the legislative history also confirms it. The division between the Section 402 and 404 programs was the result of a compromise between the House and the Senate. The initial Senate bill placed *all* discharges—including of dredged and fill material—under EPA's Section 402 permitting authority, including its effluent limitations. *See* S. 2770, 92nd Cong. § 402 (as reported by S. Pub. Works Comm., Oct. 28, 1971). It was later amended to involve the Corps in the EPA permitting process for discharges of dredged material but primary authority remained

with EPA. *See* 117 Cong. Rec. S38856, S38883 (1971); S. Rep. No. 92-414, at 71 (1971). On the other hand, the House bill contained Section 404, which gave the Corps sole authority over dredged or fill material, subject to only minimal input from EPA. *See* 118 Cong. Rec. 10632 (1972).

Congress resolved the disparity in conference. The conference substitute, which became the CWA, adopted the House bill as modified by an EPA suggestion. *See* Alaska Br. 38-40. Section 404 remained the sole authorization for permitting discharges of dredged and fill material. However, Section 404 gives EPA the power to promulgate the Section 404(b)(1) Guidelines under which potential fill material discharges are reviewed, and it gives EPA the power to veto or restrict any permit granted by the Corps. 33 U.S.C. § 1344(c).

3. In light of the statutory language and history, it is no surprise that the agencies tasked with interpreting the CWA have consistently recognized, since the Act's inception, that only one permit is required for a particular discharge. In 1973, EPA promulgated a regulation, after notice and comment, providing that "[d]redged or fill material discharged into navigable waters" does "*not require an NPDES [i.e., Section 402] permit.*" 38 Fed. Reg. 13,528, 13,530 (1973) (codified at 40 C.F.R. § 125.4(d) (1973)) (emphasis added). That regulation remains today, in virtually identical form. *See* 40 C.F.R. § 122.3(b).

In 1986, the Corps and EPA adopted a Memorandum of Agreement ("MOA") governing the process by which the agencies would determine whether a discharge was "fill material" regulated by the Corps under Section 404, or other material regulated by EPA under Section 402. 51 Fed. Reg. 8,871 (1986).

The MOA recognized that a prospective discharge must be permitted under either Section 402 or 404, but not both. *Id.* at 8,872 (1986) ("EPA * * * ha[s] been vested with authority to permit discharges of pollutants, *other than dredged or fill material*, into waters of the United States pursuant to section 402" whereas "the Army * * * ha[s] been vested with authority to permit discharges of dredged or fill material") (emphasis added).

Over 15 years later, both agencies confirmed, after notice and comment, that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (2002) (emphasis added). They also noted in comments that "[i]f a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa." JA83a.

Under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), these formal statements of agency policy are conclusive because they are a reasonable interpretation of the statute. So even if there were any ambiguity as to whether Section 402's "[e]xcept as provided in" clause makes the 402 and 404 programs mutually exclusive, the agencies' consistent interpretation is entitled to dispositive deference.

B. The Section 404(b)(1) Guidelines Rigorously Protect Water Quality.

The practical applications of the Section 402 and 404 programs also show why they are mutually exclusive. The Section 404 regulations were specifically designed to address the concerns applicable to fill material, as distinguished from other kinds of pollutants. Yet although the Corps is not required to apply EPA effluent limitations to the permitting of fill material, all relevant water quality

and environmental concerns are fully and rigorously protected by the Section 404 process.

Congress established a separate permitting scheme for fill material because it poses different environmental concerns from discharges of other pollutants. *See* JA47a (the "two regulatory programs were established by the CWA serving distinct objectives and goals"). As recognized in *Rapanos*,

> In contrast to the pollutants normally covered by the permitting requirement of [Section 402(a)], "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream * * *. *The Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)].*

Rapanos, 547 U.S. at 744-45 (plurality).

The agencies set the division between the programs based on the effects of fill material to "ensure that discharges with similar environmental effects will be treated in a similar manner under the regulatory program." 67 Fed. Reg. 31,133 (2002). With fill material, "the principal environmental concern is the loss of a portion of the water body itself." 65 Fed. Reg. 21,292, 21,293 (2000). Thus, the Section 404(b)(1) Guidelines "go beyond * * * a water quality based approach to require numerous additional considerations before a section 404 permit may be issued." *Id.* They include some water quality standards required for a Section 402 permit, like the Section 307 toxic effluent limitation guidelines. *See, e.g.*, 40 C.F.R. § 230.10(b)(2). But they exclude standards that are not appropriate for fill material, such as Section 306 effluent limitations. Those limitations were not written with an intent to apply

them to fill material. *See* 67 Fed. Reg. 31,135 (2002). They are designed for liquid discharges with small amounts of solids in them and often place a cap on total suspended solids. The amounts of allowable particulates are so small that they are normally expressed in parts-per-million. *See, e.g.*, 40 C.F.R. § 440.104. Fill material could never meet such a standard.

Instead, the Section 404(b)(1) Guidelines contain their own rigorous standards that recognize the special concerns posed by fill material while broadly prohibiting harm to water quality, aquatic life, and human health, among many other things. *See, e.g.*, 40 C.F.R. § 230.10. For example, the Guidelines provide that "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States." *Id.* § 230.10(c). To meet that standard, the Corps must make particular determinations regarding expected changes to salinity, contamination, and suspended particulates. *Id.* § 230.11. It may require the discharger to take particular actions to decrease the discharge's effect on water quality when these actions would be helpful. *Id.* §§ 230.71, 230.72. Unlike EPA when it reviews Section 402 permits, the Corps must also disapprove a permit if another alternative disposal site would be more environmentally sound. *Id.* § 230.10(a). And if EPA is still not satisfied after the Corps has applied all these water quality protections and a panoply of others, it can veto or modify the permit. 33 U.S.C. § 1344(c).

Here, it would have made no sense for the agencies to apply effluent limitations—with their stringent caps on suspended solids—to the proposed discharges of fill material. The tailings discharges

consist of non-toxic ground up earth and rock, and are thus chemically identical to normal fill discharges that indisputably can be, and routinely are, permitted by the Corps even under SEACC's interpretation. *See* JA93a (mine tailings "may have a slightly different physical form from the traditional rock and soil used as fill material, but [they] can have the same effect on the aquatic environment as those materials").

The Corps therefore reasonably concluded that it would be preferable for Coeur to use the tailings as fill in the lake, rather than obliterate an even greater area of wetlands using the same basic kind of material just so it could construct a monstrous open-air stack of tailings on top of that filled land. *See* Alaska Br. 47; Alaska Reply Br. 13. It would make no sense to require both a Section 404 and Section 402 permit simply because a fill discharge comes from a mine, when a discharge of the same chemical and physical composition with the same environmental effect would be regulated exclusively under Section 404 if it came from a different place. The tailings at issue are not some sort of toxic sludge, but rather are chemically and physically identical to the kind of indisputably lawful fill discharges that the Corps routinely permits throughout the nation.

In this case, EPA and the Corps worked together to recognize the appropriate permitting mechanism and then continued to work in tandem to provide a permit that requires Coeur to discharge the fill material in the most environmentally sound method possible. To reach this conclusion, the Corps examined 20 different factors in making its Section 404 determination. JA343a. And it added additional environmental protections at EPA's urging. *See, e.g.*,

ER476 (tailings capping requirement added to allay EPA concerns). The permit itself requires Coeur to use silt screens or other methods to "confine suspended particles * * * to a small area where settling can occur in Lower Slate Lake" and requires testing for toxins. JA276a.

Thus, water quality is fully protected by the Section 404 permit. Any short-term loss of aquatic life will not result from any water quality issues. *See* Alaska Br. 15-16. It will result from the tailings' physical attributes, which are the same as any other fill material. *Id.* The same loss of life would occur if the fill material came from a different source that is indisputably subject only to a Section 404 permit. And in the long term, the lake will provide a stronger aquatic habitat than it did previously. *Id.*

Moreover, to the extent that any particulates are discharged from Lower Slate Lake into downstream waters, that separate, subsequent discharge is subject to an EPA permit under Section 402 that meets all relevant EPA criteria. The agencies' division of responsibilities required Coeur to obtain (1) a Section 404 permit from the Corps for the fill material discharges *into* the lake impoundment and (2) a separate Section 402 permit from EPA for any non-fill discharges *from* the lake impoundment into downstream waters. There is no basis for upsetting that carefully-crafted administrative scheme.

CONCLUSION

For the foregoing reasons, and those in Alaska's previous briefs, the judgment below should be reversed.

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SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in Goldbelt's brief in support of petitioners remains accurate.

TABLE OF CONTENTS

I. ARGUMENT 1

1. Question 1. The Court Below Relied on Facts and Authorities Extraneous to the Record Supporting Goldbelt's Permit for the Cascade Point Marine Terminal 1

2. Question 2. Although Discharges Must Be Permitted Either As Fill or Effluent, Sections 404 and 402 Were Properly Employed In Tandem to Satisfy the Clean Water Act In This Case 2

3. The Ninth Circuit's Flawed Construction of the Clean Water Act Is Having a Devastating Impact on Natives in Southeast Alaska 6

II. CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990) 1, 7

STATUTES

CLEAN WATER ACT, Section 301, 33 U.S.C. § 1311 5

CLEAN WATER ACT, Section 306, 33 U.S.C. § 1316 5

CLEAN WATER ACT, Section 307, 33 U.S.C. § 1317 4

CLEAN WATER ACT, Section 401, 33 U.S.C. § 1341 4

CLEAN WATER ACT, Section 402, 33 U.S.C. § 1342 ..... 2, 3, 4, 5

CLEAN WATER ACT, Section 404, 33 U.S.C. § 1344 ..... *passim*

CLEAN WATER ACT, Section 404(b)(1), 33 U.S.C. § 1344(b)(1) 3

REGULATIONS

40 C.F.R. § 230.10(b)(2) 4

40 C.F.R. § 401.15 4

404(b)(1) Guidelines, 40 C.F.R. §§ 230.1-230.80 .... 3, 4

51 Fed. Reg. 8871 3

67 Fed. Reg. 31,135 3

SUPPLEMENTAL BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

I. ARGUMENT

Goldbelt adopts the arguments set forth in the brief filed by Coeur Alaska, Inc., and in addition submits the following:

1. Question 1. The Court Below Relied on Facts and Authorities Extraneous to the Record Supporting Goldbelt's Permit for the Cascade Point Marine Terminal

If Goldbelt correctly apprehends the first question posed by this Court's Order of May 4, 2009, it asks whether the holding in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990), requires that review of Coeur's 404 permit should be solely with reference to the record prepared by the Corps of Engineers under its permitting authority, leaving questions of possible violations of statutes administered by the Environmental Protection Agency to subsequent proceedings, if any, brought to enforce those statutory provisions.

Goldbelt submits that the holding of *Pension Benefit Guaranty* applies with special force to review of Goldbelt's 404 permit to construct a marine terminal at Cascade Point. Goldbelt's 404 permit is limited to placement of rock fill material in tideland waters to construct the Cascade Point dock facility, several miles distant from Lower Slate Lake, and does not itself authorize any discharge of tailings slurry. J.A. 434a-458a.

The Ninth Circuit did not bother to review or discuss the administrative record prepared by the Corps in support of Goldbelt's permit. Rather, it vacated that permit on the sole and facially erroneous assumption that the dock could not possibly serve its intended purpose of servicing the Kensington mine if Coeur Alaska's 404 permit encompassing discharge of tailings was invalidated, forcing Coeur to pursue a different method of tailings disposal for the mine to be able to proceed.

Following *Pension Benefit Guaranty*, the Ninth Circuit should have constrained its review to the question of whether issuance of the permit to Goldbelt was arbitrary, capricious or not in accordance with law based on the record applicable to that permit, leaving for future consideration whether the dock could fulfill its purpose under a mine configuration employing a method of tailings disposal other than the one it (wrongly) struck down. Instead, Goldbelt's permit fell victim to the Ninth Circuit's zeal to accommodate SEACC's request to also strike down the Goldbelt 404 permit and further frustrate and delay operation of the Kensington mine, without regard to the method of tailings disposal.

2. Question 2. Although Discharges Must Be Permitted Either As Fill or Effluent, Sections 404 and 402 Were Properly Employed In Tandem to Satisfy the Clean Water Act In This Case

The second question posed by the Court's Order asks whether a discharge that comes within the scope of both effluent regulated by the EPA and fill

regulated by the Corps may or must be permitted under both Section 402 and 404 of the Clean Water Act?

The permitting authorities administered by EPA and the Corps are mutually exclusive. That is, a discharge will be permitted either as fill under Section 404 or effluent under Section 402. Section 402 authorizes EPA to issue permits for discharge of pollutants "except as provided in section . . . 404." The legislative history of the two sections (discussed at Brief of Federal Respondents 22) and the consistent interpretation of the Clean Water Act by both EPA and the Corps confirms that the two permit systems are complementary, but mutually exclusive.

As a practical matter, the agencies have long acknowledged that fill frequently contains substances that would require a 402 permit were they not entrained in the fill material. *See* 51 Fed. Reg. 8871 and 67 Fed. Reg. 31,135, discussed at Brief of Federal Respondents 27. Congress wisely left it to the agencies to work out the definition of fill and how to address the jurisdictional overlap when fill contains materials otherwise subject to the EPA's permitting authority.

In section 404(b)(1) Congress directed EPA and the Corps to promulgate regulations to minimize the environmental impacts associated with fill disposal sites. Those regulations, known as the "404(b)(1) Guidelines" contemplate that fill materials may contain a wide range of "contaminants," 40 C.F.R. § 230.60, and provide that the effects of these contaminants on the environment may be minimized by conditioning the 404 permit in a variety of ways, including choice of disposal area, treatment,

dispersion, and control following discharge. 40 C.F.R. Part 230, Subpart H. A number of these methods have been employed in the design and conditions applicable to the Kensington tailings storage facility. Only fill containing contaminants that would violate an applicable "toxic effluent standard or prohibition under Section 307 of the Act" is categorically excluded from permitting under Section 404. 40 C.F.R. § 230.10(b)(2).[1]

Although the Sections 402 and 404 permitting authorities are mutually exclusive, they can be employed in tandem to insure that materials permitted as fill do not result in violation of water quality standards or release of potentially harmful effluent beyond the immediate zone of deposition. This staged treatment of permit requirements for fill and effluent is reflected in Alaska's certification pursuant to Section 401 of the Clean Water Act that the discharges into and out of Lower Slate Lake will not violate State water quality standards.

Alaska's certification (J.A. 258a-265a) authorizes the tailings impoundment facility as a 404 specified disposal site and a "treatment work" under State law, within which water quality standards do not apply as long as discharges from the treatment work

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[1] A list of substances deemed to be "toxic pollutants" is maintained by the Administrator of the EPA. 40 C.F.R. § 401.15. Plaintiffs have not argued – nor could they – that the relatively benign materials entrained in the Kensington tailings violate any toxic effluent standard, nor do they dispute that the 402 permit that will be issued for discharges from the Lower Slate Lake impoundment will insure that any discharge satisfies effluent limits and state water quality standards.

are controlled by an NPDES permit from EPA to insure compliance with effluent limits and water quality standards. J.A. 258a-259a. The EPA did just that, issuing a 402 NPDES permit for the limited amount of water discharged from the impoundment that is not recycled, requiring adherence to applicable effluent limits and standards. J.A. 317a-331a. The Corps and EPA agreed with the State on application of 301 and 306 effluent limits and State water quality standards to discharges from the impoundment, while regulating the discharge into the impoundment under 404, as a specified disposal site. J.A. 144a-145a, 146a-149a. The plaintiffs have not challenged the State's 401 certification or the 402 permit

Thus, while the permitting systems under sections 402 and 404 are mutually exclusive for a particular discharge, they may be employed in tandem to regulate an overall project. In the case of the Kensington mine, both permitting systems were applied to insure that any "effluent" entrained in the tailings discharged into the Lower Slate Lake impoundment as "fill" will be controlled in the terms of the NPDES permit required for discharges from the impoundment. This common sense approach was developed after extensive discussions between the Corps and EPA, and should not be disturbed, particularly given the absence of a clear statutory mandate requiring a different approach and the plaintiffs' limited challenge to the 404 permit for the discharge of tailings slurry into the impoundment.

3. The Ninth Circuit's Flawed Construction of the Clean Water Act Is Having a Devastating Impact on Natives in Southeast Alaska

During its construction – which was nearly complete before the Ninth Circuit issued its injunction – the Kensington Mine provided more than 300 high paying jobs (J.A. 504a) in a region suffering a long-term decline in the number of traditional jobs in the timber and fishing industries. The current economic downturn has been particularly devastating for Alaska Natives. Coeur Alaska, with its Native friendly employment policies, had provided Goldbelt's shareholders with employment, contracting opportunities, as well as training for future jobs in the mining industry. Goldbelt's marine terminal, which stands half completed, represented the first opportunity of Juneau area Tlingits to develop the lands Congress awarded them more than a quarter century ago as compensation for their aboriginal claims in the Berners Bay area.

The Ninth Circuit's action has stopped a mostly constructed, environmentally sound economic development project in its tracks, with profoundly devastating impacts to Alaska Native enterprises and families. This unwarranted reinterpretation by the Ninth Circuit of the established sound Clean Water Act permitting regime, relied upon not only by Coeur Alaska but the Alaska Native and other communities and citizens of the State, falls with particular harsh unfairness during the current dire economic times, and is a particular insult and setback to Goldbelt's federal law land entitlement.

II. CONCLUSION

The adequacy of the record made by the Corps of Engineers with respect to Goldbelt's marine terminal has not been questioned by either the plaintiffs or the Ninth Circuit. The decision to vacate Goldbelt's permit was based solely on speculation that the dock could not fulfill its purpose of servicing the mine if Coeur were forced to pursue a different method of tailings disposal. In so doing, the Ninth Circuit, contrary to the teaching of *Pension Benefit Guaranty*, impermissibly based its decision on matters outside the record supporting permit issuance and anticipated a future violation that in all probability would never occur.

The record compiled by the Corps of Engineers in support of the 404 permit issued to Coeur for the Lower Slate Lake tailings storage facility reflects years of testing and analysis demonstrating the environmental soundness of the projects. The agencies' carefully considered two-stage approach to permitting the tailings impoundment insures that water quality protection will be upheld and the regulatory jurisdiction of both the Corps and EPA will be exercised as intended under the Clean Water Act.

For the foregoing reasons, Goldbelt respectfully requests that the decision of the Ninth Circuit Court of Appeals be reversed as to all parties, including Goldbelt.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

Supreme Court, U.S.
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Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA,
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS SOUTHEAST ALASKA CONSERVATION COUNCIL, SIERRA CLUB, AND LYNN CANAL CONSERVATION

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QUESTIONS PRESENTED

1. If the discharge of the slurry into the lake would violate Section 301 or Section 306 of the Clean Water Act, would that future violation authorize a court to set aside the permits issued by the United States Army Corps of Engineers, and the Record of Decision issued by the United States Forest Service, as "not in accordance with law," 5 U.S.C. § 706(2)(A)?

2. If a discharge comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material, may the discharger obtain permits under both Section 402 and Section 404 of the Clean Water Act? Must the discharger do so?

RULE 29.6 STATEMENT

The corporate disclosure statement included in the merits brief of Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation remains accurate.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
ARGUMENT 2
I. THE CORPS' DECISION TO AUTHORIZE THE DISCHARGE IN THIS CASE MUST BE SET ASIDE AS "NOT IN ACCORDANCE WITH LAW." 2
A. The Section 404 Permit Is in Actual Conflict with Other Provisions of the Clean Water Act. 2
B. Section 404 Does Not Exempt the Discharge at Issue from Compliance with Other Provisions of the Act. 6
C. The Corps Has Expertise to Recognize Discharges That Are Subject to Effluent Limitations. 8
D. The Corps' Permit Trenches on EPA's Authority. 10
II. A SINGLE DISCHARGE IS SUBJECT TO ONLY ONE PERMIT. 12

TABLE OF AUTHORITIES—Continued

Page(s)

CASES

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962) 10

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 3

FCC v. Fox Television Stations, Inc.,
No. 07-582, slip op. (U.S. April 28, 2009) 16

FCC v. NextWave Personal Comm'ns, Inc.,
537 U.S. 293 (2003) 2, 3, 4, 7, 8

FEC v. Akins,
524 U.S. 11 (1998) 6

J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.,
534 U.S. 124 (2001) 7

Kentuckians for the Commonwealth v. Rivenburgh,
317 F.3d 425 (4th Cir. 2003) 8, 9

Morton v. Mancari,
417 U.S. 535 (1974) 7

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 16

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
127 S. Ct. 2518 (2007) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990) 3, 6, 8, 10

SEC v. Chenery Corp., 318 U.S. 80 (1943) 5

STATUTES

Administrative Procedure Act:

5 U.S.C. § 706(2) ..... i, 1, 2, 4, 5

Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") as amended:

§ 301(b)(2)(E), 33 U.S.C. § 1311(b)(2)(E) 12

§ 301(e), 33 U.S.C. § 1311(e) 2, 5, 13

§ 304(a)(4), 33 U.S.C. § 1314(a)(4) 12

§ 306(e), 33 U.S.C. § 1316(e) 1, 2, 5, 7, 13

§ 309, 33 U.S.C. § 1319 ..... 7, 11

§ 402(a)(1), 33 U.S.C. § 1342(a)(1) 1, 2, 11, 12

§ 404(a), 33 U.S.C. § 1344(a) 7

§ 404(c), 33 U.S.C. § 1344(c) 11

§ 404(f), 33 U.S.C. § 1344(f) 7

§ 404(n), 33 U.S.C. § 1344(n) 7

§ 404(r), 33 U.S.C. § 1344(r) 7

§ 505, 33 U.S.C. § 1365 11

TABLE OF AUTHORITIES—Continued

Page(s)

REGULATIONS

33 C.F.R. § 320.3 10
33 C.F.R. § 323.2(f) 13
40 C.F.R. Part 231 11
40 C.F.R. § 230.10 ..... 9, 10
40 C.F.R. § 401.11 12
40 C.F.R. § 440.100(a)(2) 9
40 C.F.R. § 440.102(b) 15
40 C.F.R. § 440.104(b)(1) 13, 15

ADMINISTRATIVE MATERIALS

47 Fed. Reg. 25,682 (June 14, 1982) 12. 15
67 Fed. Reg. 31,129 (May 9, 2002) 14, 15

INTRODUCTION

In its Order of May 4, 2009, the Court directed the parties to address two questions: (1) whether a fill discharge permit purporting to authorize a discharge that would violate section 306 or 301 of the Clean Water Act must be set aside as "not in accordance with law" under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A); and (2) whether a discharger can, or must, obtain a permit under both section 402 and section 404 of the Clean Water Act when a discharge that is subject to an Environmental Protection Agency (EPA) effluent limitation also meets the regulatory definition of "fill material." The answer to the Court's first question is "yes" and to both parts of the second question is "no."

The section 404 permit at issue in this case is "not in accordance with law." *Id.* It purports to authorize a discharge that, by the premise of the Court's question, would directly violate section 306 of the Clean Water Act. *See* 33 U.S.C. § 1316(e). It does so, moreover, on the basis of the legally erroneous conclusion that the discharge is exempt from that section. This Court's precedents and the plain language of the APA make clear that in these circumstances an agency's "actions" and "conclusions" must be set aside. 5 U.S.C. § 706(2).

Though the discharge here is both "fill material" and "process wastewater" subject to an effluent limitation, it cannot be permitted under both sections 402 and 404 of the Clean Water Act. Section 402 is prefaced with the clause, "Except as provided in sections [318] and [404]," 33 U.S.C. § 1342(a)(1), reflecting Congressional intent that a single discharge is

not subject to permits under both sections. When a single wastewater discharge implicates both an effluent limitation and "fill material," the plain language of the Act requires that the discharge must be permitted, if at all, under section 402. 33 U.S.C. §§ 1311(e), 1316(e), 1342(a)(1)(A). Here, because the effluent limitation allows no discharge, there can be no permit under either section. Coeur must find an alternative disposal method, as specifically intended by EPA when adopting the effluent limitations for ore processing mills.

ARGUMENT

I. THE CORPS' DECISION TO AUTHORIZE THE DISCHARGE IN THIS CASE MUST BE SET ASIDE AS "NOT IN ACCORDANCE WITH LAW."

A. The Section 404 Permit Is in Actual Conflict with Other Provisions of the Clean Water Act.

The answer to the Court's first question is "yes." Any decision by the Corps to authorize a discharge that would directly violate another section of the Clean Water Act—or any other law—must be set aside as "not in accordance with law" under the APA. 5 U.S.C. § 706(2)(A). "The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. § 706(2)(A)—which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." *FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) (emphasis in original).

Thus, it is irrelevant that the Corps itself does not administer effluent limitations under sections 301 or 306 of the Act. In *NextWave*, for example, this Court set aside a decision of the Federal Communications Commission (FCC) to cancel a license for broadband personal communications services on the ground that the cancellation violated a provision of the Bankruptcy Code, a statute the FCC does not administer. *See id.*; *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 318-19 (1979) (holding that disclosure of documents under Freedom of Information Act by Defense Logistics Agency would be "not in accordance with law" if it violated the Trade Secrets Act).

That the Corps purported to authorize an actual violation of section 306 distinguishes this case from *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), cited by the Court in its first question. There, this Court held that a decision of the Pension Benefit Guaranty Corporation (PBGC) to restore a pension plan was not "arbitrary" or "capricious" on account of the agency's failure to consider the "policies and goals" of bankruptcy and labor laws. *See id.* at 645-47. The Court relied in part on the difficulty of requiring agencies to consider the policies and goals of all federal laws, noting that "there are numerous federal statutes that could be said to embody countless policies." *Id.* at 646.

The Court, however, pointedly distinguished the circumstances of the present case: "The Court of Appeals did not hold that the PBGC's decision *actually conflicted* with any provision in the bankruptcy or labor laws...." *Id.* at 645 (emphasis in original). Here, by contrast, the premise of the Court's question is that the discharge would actually violate sec-

tion 301 or 306. Where an agency's decision actually conflicts with another law, rather than merely fails to consider its general policies, *NextWave* provides the answer: The courts must set aside the action as "not in accordance with law."[1] 537 U.S. at 300 (quoting 5 U.S.C. § 706(2)(A)).

The permit must be set aside now under the APA even though the unlawful discharges would, of course, take place in the future. This is because the Corps' action here is not merely neutral as to Coeur Alaska's future compliance with section 306. Rather, the Corps issued a permit that specifically authorizes the company to discharge the slurry in a manner that the Court's question assumes would violate section 306. *See* J.A. 266a ("*You are authorized* to perform work in accordance with the terms and conditions specified below.") (emphasis added).

Moreover, the Corps explicitly based its decision on the erroneous conclusion that the discharge was exempt from any effluent limitations under sections 301 or 306. The rationale for this conclusion is found in the Regas memo of May 17, 2004, J.A. 144a-45a, which the Corps explicitly adopted in its decision to issue the Kensington fill material permit. *See* J.A. 342a ("This decision has been made in confor-

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[1] For the same essential reason, the Forest Service's Record of Decision approving the mine's operating plan, which is dependent upon discharge of wastewater slurry into Lower Slate Lake, must also be set aside. *See* J.A. 212a (approving use of lake for tailings disposal); J.A. 194a (describing method of discharging slurry). No party has argued in this Court that the Record of Decision can be sustained if the section 404 permit is set aside.

mance with the USEPA memorandum, entitled, 'Clean Water Act Regulation of Mine Tailings', dated May 17, 2004."); SER 901 n.89; *see also* J.A. 142a (Regas memo adopted by EPA in coordination with the Corps). The APA requires courts to set aside not only agency "actions" but also "findings" and "conclusions" that are "not in accordance with law." 5 U.S.C. § 706(2). The Corps' adoption of the "conclusions" of the Regas memo, and its issuance of a permit premised on those conclusions, must therefore be set aside.[2]

Indeed, the Corps does not claim authority to issue a section 404 permit for a discharge that would actually violate section 306. The Corps' own rationale for the permit is not that its issuance reflects mere agnosticism about whether the discharge would violate section 306, but that section 306 does not apply. Thus, even if there were a way for the Corps to issue a section 404 permit that was merely neutral on compliance with section 306, the permit at issue here could not be upheld on that basis because that was not the agency's own rationale. Under the venerable rule of *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943), the Court may not uphold an agency

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[2] The premise of both of the Court's questions for supplemental briefing is that the Regas memo is contrary to law. That memo is entitled to no deference because it ignores the plain language of sections 301(e) and 306(e) of the Act, 33 U.S.C. §§ 1311(e), 1316(e), and because it directly contradicts the agencies' stated intent at the time they adopted the 2002 fill rule, which the memo purports to interpret. *See* Brief for Respondents Southeast Alaska Conservation Council, et al. ("SEACC Br.") at 58-60; *see also infra* pp. 13-15.

action on the basis of a legal theory different from that on which the action was premised.[3] *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 25 (1998).

B. Section 404 Does Not Exempt the Discharge at Issue from Compliance with Other Provisions of the Act.

In determining that it was not arbitrary for the PBGC to disregard the policies of labor and bankruptcy laws, this Court held that the "most important" consideration was the plain language of the statute under which the agency acted. *PBGC*, 496 U.S. at 645. In that case, the relevant statute limited the agency's consideration to its duties "under this title." *Id.* at 646 (quoting 29 U.S.C. § 1347). In that circumstance, the Court held that the agency need not heed "policies" of other statutes if the agency's action did not "actually conflict" with another statute. *Id.* at 645.

Here, by contrast, the plain language of section 404 makes clear that the Corps cannot authorize discharges that would violate other provisions of the

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[3] The practical difference between the two theories is dramatic. Under the agencies' theory that section 306 does not apply to Coeur's discharge, the issuance of the fill permit reflects a determination that the discharge is lawful under the Clean Water Act. If, however, the fill permit merely reflected the Corps' view that the discharge complied with section 404 but remained subject to other sections of the Act, section 306(e) would prohibit the discharge, and Coeur would be subject to EPA enforcement action or a citizen suit if it attempted to begin discharging under the permit. Thus, under *Chenery*, the courts may not simply substitute a different rationale for the Corps' action here.

Clean Water Act. Section 404 has highly specific provisions exempting certain discharges from section 404 and other provisions of the Act, but none of them exempts the discharge at issue here from compliance with section 301 or 306. *See* 33 U.S.C. § 1344(f), (r); *see also NextWave*, 537 U.S. at 302 ("where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"). Section 404's enforcement provision—subsection (n)—makes explicit that other provisions of the Act remain applicable: "Nothing in this section shall be construed to limit the authority of the [EPA] Administrator to take action pursuant to section [309]." 33 U.S.C. § 1344(n). Section 309, in turn, authorizes EPA to take enforcement actions for violations of various provisions of the Act, including, explicitly, sections 301 and 306. *Id.* § 1319(a)(3), (b), (c)(1)-(3), (d), (g)(1).

Nor is there any conflict between sections 404 and 306 that would require the Court to find that the former includes an implied exception to the latter. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *NextWave*, 537 U.S. at 304 (quoting *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))). Section 404 is a grant of discretionary authority, while section 306(e) is an unqualified prohibition. *Compare* 33 U.S.C. § 1344(a) ("The Secretary may issue permits") *with id.* § 1316(e) ("it shall be unlawful"). In these circumstances, there is no conflict between the statutes—the discretionary authority (section 404) must be exercised in compliance with the prohibition (sec-

tion 306). *See NextWave*, 537 U.S. at 304 (discretionary auctioning authority of Communications Act must be conducted in compliance with Bankruptcy Code's prohibition against revoking licenses of debtors); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2536-37 & n.9 (2007) (discretionary agency authority must be exercised in compliance with the prohibitions of the Endangered Species Act); SEACC Br. at 26-27, 29.

C. The Corps Has Expertise to Recognize Discharges That Are Subject to Effluent Limitations.

PBGC's holding was also based in part on the fact that the labor and bankruptcy laws at issue there were, unlike the Clean Water Act in this case, completely outside the agency's "enabling Act." *PBGC*, 496 U.S. at 646. Here, the Corps' enabling authority (section 404) and the prohibitions against violating effluent limitations (sections 301(e) and 306(e)) are in the same Act.

Further, the Court in *PBGC* noted that the agency had no expertise in labor or bankruptcy laws. *See id.* Here, the Corps has long experience in recognizing when a proposed discharge is subject to an effluent limitation. Before the Regas memo, the Corps had, since at least 1977, refused to issue permits for proposed discharges that were subject to effluent limitations. *See Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 445 (4th Cir. 2003) (noting that the Corps was authorized to grant permits for fill discharges "unless the fill amounted to effluent that could be subjected to effluent limitations," which the court described as "a

longstanding and consistent division of authority between the Corps and the EPA"); *id.* at 448 (noting that the Corps' interpretation of fill material excluded "effluent that could be regulated by ongoing effluent limitations"); J.A. 83a-84a.[4]

The Corps has also long recognized that it must heed other statutes when issuing—or denying—section 404 permits. The 404(b) guidelines are prefaced with this very observation. *See* 40 C.F.R. § 230.10 ("Note: Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement of these Guidelines will not automatically receive a permit."). It would be nonsensical to hold that the Corps has sufficient expertise to comply with statutes like the Marine

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[4] The Corps need not possess expertise to interpret and apply specific effluent limitations in specific situations, which is EPA's job, but merely to recognize when a discharge is from a source that is subject to these limitations. That is not an especially difficult task, because the effluent limitations describe with particularity the precise sources to which they apply. *See, e.g.*, 40 C.F.R. § 440.100(a)(2) ("The provisions of this subpart J are applicable to discharges from ... Mills that use the froth-flotation process ... for the beneficiation of ... gold ... ores...."). Because fill material permits normally involve the use of clean fill to build useful structures like docks and bridges, or buildings on wetlands, the question here arises only in the relatively unusual circumstance that an applicant proposes to discharge effluent from an industrial source as "fill material." Prior to the Regas memo, the Corps had for many years demonstrated its ability to identify and reject applications for discharges of effluents from sources subject to EPA effluent limitations. *See Kentuckians*, 317 F.3d at 445, 448; J.A. 83a-84a.

Protection, Research, and Sanctuaries Act of 1972 (administered by the Department of Commerce), *see id.* § 230.10(b)(4), but not with the very Act under which the Corps operates. *See also* 33 C.F.R. § 320.3 (listing statutes limiting Corps' permitting discretion). *PBGC*'s rationale regarding lack of agency expertise simply does not apply here.

D. The Corps' Permit Trenches on EPA's Authority.

PBGC also distinguished the situation—relevant here—where an agency's action "'trench[ed] upon the ... jurisdiction' of another agency." *PBGC*, 496 U.S. at 645 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962)). The Corps' permit here purports to authorize a discharge that the Court's question assumes would violate an effluent limitation adopted and administered by EPA. The permit is based on the legally erroneous conclusion that the effluent limitation does not apply to this effluent, eviscerating EPA's authority and obligations under the Clean Water Act.

That EPA consented to this transfer of jurisdiction is irrelevant, since EPA's disavowal of its jurisdiction was based on the same legal error. As discussed above, the Corps and EPA both adopted the Regas memo's conclusion that "fill material" discharges are exempt from section 301 and 306 effluent limitations. To the extent that conclusion was unlawful, as postulated by the Court's question, the Corps' use of it as the basis for authorizing discharges that violate EPA's effluent limitations trenches on EPA's jurisdiction.

Finally, to hold that the Corps is free to issue permits for discharges that would violate sections 301 or 306 would lead to untenable results. EPA would not be able exercise *permitting* authority over such discharges, due to the prefatory clause of section 402. *See* 33 U.S.C. § 1342(a)(1) ("Except as provided in sections [318] and [404], the Administrator may ... issue a permit..."). [5] EPA could potentially go through the cumbersome process of vetoing the permit, but only if EPA found that the discharge would have "an unacceptable adverse effect" on various resources. *Id.* § 1344(c); *see* 40 C.F.R. Part 231 (EPA veto procedures). Alternatively, EPA could bring an action to enforce the violation of section 306, *see id.* § 1319, as could adversely affected private citizens. *See id.* § 1365(a)(1), (f). Such a regulatory regime would hamstring EPA's authority by depriving it of the most efficient way of preventing unlawful discharges (the exercise of permitting authority) and relegating it to the cumbersome, legally constrained veto process or post-hoc enforcement. Nor would such a reading of the Act be desirable from the standpoint of dischargers such as Coeur Alaska, who might spend millions of dollars to construct a new source ostensibly permitted by the Corps, only to have it shut down in an enforcement action or citizen suit for violating section 306 as soon as it started discharging. Such a system would be in no one's best interest and would not serve the purposes of the Act.

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[5] This point is discussed further below, in response to the Court's second question.

II. A SINGLE DISCHARGE IS SUBJECT TO ONLY ONE PERMIT.

The answer to both parts of the Court's second question is "no." EPA's authority to issue a permit under section 402 is prefaced with the limitation, "Except as provided in sections [318] and [404]...." 33 U.S.C. § 1342(a)(1). This plain language precludes EPA from issuing a 402 permit where the Corps *properly* exercises its discretion under section 404 to issue a permit for the same discharge. Further, requiring (or even allowing) two permits for the same discharge could result in inconsistent agency actions, if, for example, one agency authorized a discharge prohibited by the other or the two agencies imposed conflicting conditions on the same discharge. Thus, EPA and the Corps have interpreted the Act to mean that a single discharge requires only one permit. *See, e.g.*, J.A. 83a ("If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa.") This is, at least, a reasonable interpretation of the preface of section 402(a)(1).

Moreover, under the regulatory definitions and agency intent in adopting them, it is not possible to separate the discharge into discrete components of process wastewater and fill material that could be permitted separately. "Process wastewater" is defined to include the solids present in the wastewater, *see* 40 C.F.R. § 401.11(f), (q) & (r), even in "very high" levels such as those from ore beneficiation mills. 47 Fed. Reg. 25,682, 25,685 (June 14, 1982); *see also* 33 U.S.C. §§ 1314(a)(4); 1311(b)(2)(E) (requiring EPA to adopt effluent limitations for suspended solids). Similarly, although the agencies' joint definition of

"fill material" focuses primarily on solids, it also includes mining slurries.[6] *See* 33 C.F.R. § 323.2(f); J.A. 48a. Thus, the entire wastewater slurry at issue in this case is both "process wastewater" subject to an effluent limitation and "fill material" under the new definition.

Regardless of which agency has permitting authority, it is clear for the reasons discussed in Part I, *supra*, that the agency may not authorize a discharge that conflicts with any provision of the Clean Water Act. The permit at issue here suffers from this defect, since it purports to authorize a discharge that would violate the zero-discharge performance standard for new ore mills and hence section 306(e). *See* 40 C.F.R. § 440.104(b)(1); 33 U.S.C. § 1316(e).

In other circumstances, where an applicable effluent limitation does not prohibit all discharges and the effluent contains suspended solids that bring it within the definition of "fill material," the Clean Water Act compels the conclusion that the only appropriate permitting authority is section 402. As discussed in SEACC's principal brief, the plain terms of sections 301 and 306 demand that any discharge comply with any applicable effluent limitations, without exception. *See* 33 U.S.C. §§ 1311(e), 1316(e). Section 404, however, provides no mechanism to apply or enforce those effluent limitations, and the Corps has no expertise or jurisdiction to do so. Section 402 is thus the only option. This conclusion is entirely consistent with section 404, which merely

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[6] Not all mining slurries or tailings are subject to effluent limitations. *See* SEACC Br. at 57-58.

grants discretionary authority that must be exercised in compliance with other mandatory or prohibitory provisions of the Act. *See supra* pp. 7-8.

EPA and the Corps foresaw and discussed the precise circumstance presented in the second question of the Court's supplemental briefing order when they adopted the revised definition of fill material in 2002. Consistent with the plain language of the Act, they stated repeatedly and consistently their intent that, when a discharge is both "fill material" and subject to an effluent limitation, the discharge would remain subject to effluent limitations and to section 402's permit requirements. *See* SEACC Br. at 11-15, 55-56. "If EPA has previously determined that a discharge is covered by an [effluent limitation guideline], that determination is not altered by today's rule." J.A. 46a; *see also, e.g.*, 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) ("Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under 402 of the CWA."); J.A. 47a-48a (same applied specifically to mine tailings and slurries); J.A. 83a-84a (same applied to mining wastes addressed in 1986 Memorandum of Agreement). Petitioners and the government point to various general statements about mining wastes, fill material, and section 404, but none of those statements specifically addresses the circumstance where a single discharge meets the definition of fill material and is also subject to an effluent limitation. Each time the agencies addressed that situation, they said the same thing. The agencies' statements upon promulgation of the fill rule reflect a sound interpretation of the Act and should be given effect.

That section 402 is the exclusive permitting program for enforcing effluent limitations is not contradicted by the statement in the fill rule's preamble, repeatedly cited by Petitioners, that "EPA has never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135. For decades, EPA has applied effluent limitations to industrial wastewater that, left untreated, would meet EPA's longstanding effects-based definition of "fill material." *See* J.A. 27a; SEACC Br. at 7-9, 44-45, 49-50. EPA's effluent limitations require the use of settling ponds (not in navigable waters) and other technologies that can remove all or nearly all of the suspended solids before they are discharged to navigable waters. *See* SEACC Br. at 9, 44-45. Thus, although the *untreated* effluent from these sources would be "fill material" under EPA's definition, wastewater discharges allowed by section 402 permits typically have only small components of solids that would not constitute "fill material."[7] Read in this light, the assertion that EPA has never regulated fill material through effluent limitations, though potentially confusing, is consistent with EPA's longstanding practice.

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[7] For example, the untreated effluent from ore beneficiation mills generally has "very high suspended solids levels," 47 Fed. Reg. at 25,685, in this case 55% solids by weight and 30% by volume. *See* SEACC Br. at 3-4. But, through the application of best technologies, EPA has set effluent limits of 30 milligrams per liter daily maximum for old mills, 40 C.F.R. § 440.102(b), and zero discharge for new mills. *Id.* § 440.104(b)(1). Thus, while the raw effluent is "fill material," any permitted discharge to navigable waters is not.

While the zero-discharge limit applicable to new ore processing mills precludes a permit under either permitting program in this case, it does not mean the mine cannot operate. It means that the operator must select a feasible alternative wastewater disposal method, *see* SEACC Br. at 11, 19, which is exactly what EPA intended when it adopted the zero-discharge limit in 1982. *See id.* at 9. If EPA wished to repeal this requirement, which of course is within the agency's power, it was required to say so and to supply a "reasoned analysis." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 ('1983). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, No. 07-582, slip op. at 11, 2009 WL 1118715, at *9 (U.S. April 28, 2009). In the present case, the agencies have taken a position that they may simply disregard EPA's effluent limitations—"rules that are still on the books." In adopting the new fill material definition, they never expressed an intent to repeal or alter those rules, and in fact they stated just the opposite. In the absence of a reasoned analysis in the rulemaking record for the alleged reversal of position, or even an acknowledgment of it, the effluent limitations must be treated as effective.

In short, a single discharge may be eligible for a permit under section 402 or section 404, but not both. Where, as here, EPA has adopted a zero-discharge limit for an industrial source, no permit is available under either provision, and *any* permit that purports to authorize such a discharge is, necessarily, not in accordance with law. For sources subject

to effluent limitations that allow some discharges, section 402 is the only available permit program.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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Nos. 07-984 and 07-990

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

By order dated May 4, 2009, the Court directed the parties to file supplemental briefs addressing the following questions:

1. If the discharge of the slurry into the lake would violate Section 301 or Section 306 of the Clean Water Act, would that future violation authorize a court to set aside the permits issued by the United States Army Corps of Engineers and the Record of Decision issued by the United States Forest Service, as "not in accordance with law," 5 U.S.C. § 706(2)(A)? See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 646 (1990).

2. If a discharge comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material, may the discharger obtain permits under both Section 402 and Section 404 of the Clean Water Act? Must the discharger do so?

TABLE OF CONTENTS

Page

1. If this Court holds that the proposed discharge would violate Section 301 or 306, that violation would authorize a court to set aside the permits issued by the Corps but not the ROD issued by the Forest Service 3
2. If a discharge is subject to an EPA effluent limitation and also falls within the agencies' definition of the term "fill material," the discharger may not obtain permits under both Sections 402 and 404 of the CWA 11

Conclusion 17

TABLE OF AUTHORITIES

Cases:

FCC v. *NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003) 7

PBGC v. *LTV Corp.*, 496 U.S. 633 (1990) 2, 4, 5, 10

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 706(2)(A) ... 2, 4, 6

Clean Water Act, 33 U.S.C. 1251:

33 U.S.C. 1251(a) 6

33 U.S.C. 1311 (§ 301) 2, 3, 5, 7, 10, 15

33 U.S.C. 1316 (§ 306) ..... *passim*

33 U.S.C. 1317 (§ 307) 5, 7, 15

33 U.S.C. 1319 8

33 U.S.C. 1342 (§ 402) ..... *passim*

33 U.S.C. 1342(a) 12, 13

33 U.S.C. 1342(a)(1) 4

33 U.S.C. 1343 (§ 403) 7, 15

33 U.S.C. 1344 (§ 404) ..... *passim*

Statutes and regulations—Continued: Page

33 U.S.C. 1344(a) 3, 13
33 U.S.C. 1344(b)(1) 3, 5, 6
33 U.S.C. 1344(c) 13
33 U.S.C. 1344(p) (§ 404(p)) 7, 15
33 U.S.C. 1365 8
Employee Retirement Income Security Act of 1974, § 4047, 29 U.S.C. 1347 4
Organic Administration Act of 1897, ch. 2, 30 Stat. 34-36 9
16 U.S.C. 478 10
16 U.S.C. 551 9
33 C.F.R.:
Section 320.4 3
Section 320.4(a) 5
Section 320.4(d) 6
36 C.F.R.:
Section 228.1 10
Sections 228.1 *et seq.* 10
Section 228.4 10
Section 228.8 10
40 C.F.R.:
Section 122.3(b) 13
Section 125.4(d) (1973) 13
Section 230.10 ..... 3, 6
Section 230.10(a)(4)-(5) 6
Section 230.10(b)(2) 5
Section 440.104(b)(1) 16

Miscellaneous: Page

51 Fed. Reg. 8871 (1986) 13
65 Fed. Reg. 21,299 (2000) 15
67 Fed. Reg. 31,135 (2002) 13

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As explained in our prior briefs in this case, the considered position of both the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) is that new-source performance standards adopted by EPA pursuant to Section 306 of the Clean Water Act (CWA), 33 U.S.C. 1316, do not apply to the proposed tailings slurry discharge that is at issue in this case. That is because (a) the proposed discharge involves "fill material" for which Section 404 of the CWA,

33 U.S.C. 1344, establishes the applicable permitting scheme; and (b) neither Section 404 nor the regulations implementing that provision require compliance with effluent limitations promulgated under Section 301 (33 U.S.C. 1311) or 306. Both of the questions posed in the Court's May 4 order, however, assume that Section 306 standards *do* apply to the proposed discharge at issue here. Accordingly, the government's responses in this brief are based on that premise.

As to Question 1, a court would have authority to set aside the Section 404 permits at issue here if the Court were to hold that the proposed discharge would violate Section 301 or Section 306. A Corps permit authorizing a discharge that would violate the CWA is an agency action "not in accordance with law." 5 U.S.C. 706(2)(A). That is because the Corps, before deciding whether to issue a Section 404 permit, must consider all applicable CWA provisions and other federal laws bearing on the potential environmental consequences of a proposed discharge. A court would not, however, have authority to set aside the United States Forest Service (Forest Service) Record of Decision (ROD), which does not purport to reflect the Forest Service's application of the CWA to the proposed discharge, but rather approves activities based on independent criteria.

This Court's analysis in *PBGC* v. *LTV Corp.*, 496 U.S. 633 (1990) (*LTV*), is consistent with both of these outcomes. Because the Corps can reasonably be charged with considering all applicable CWA requirements when issuing a Section 404 permit, its failure to consider a permitting criterion that this Court ultimately holds to be applicable would render its permitting decision unlawful. By contrast, because the Forest Service acts pursuant to its own regulatory requirements independ-

ent of the CWA, neither its own failure to consider Section 306 nor any error the Corps may have committed during the Section 404 permitting process would warrant invalidation of its ROD.

As to Question 2, a discharger may not obtain permits under both Sections 402 and 404 of the CWA (33 U.S.C. 1342, 1344) for the same discharge—a point that all parties have agreed upon throughout the course of this litigation. The CWA makes clear that a discharge of fill material may be permitted only under Section 404, not under the mutually exclusive permitting regime of Section 402. Accordingly, if this Court holds that EPA effluent limitations apply to discharges of fill material, the CWA would require that the Section 404 permitting process take account of those limitations—notwithstanding the practical problems that this result would create.

1. **If This Court Holds That The Proposed Discharge Would Violate Section 301 Or 306, That Violation Would Authorize A Court To Set Aside The Permits Issued By The Corps But Not The ROD Issued By The Forest Service**

a. As set forth in our merits briefs (Gov't Br. 18-21; Gov't Reply Br. 4-8), Section 404 provides that the Corps "may issue permits * * * for the discharge of dredged or fill material" when certain conditions—principally contained in Corps regulations (33 C.F.R. 320.4) and the Section 404(b)(1) Guidelines (40 C.F.R. 230.10), which make no mention of Section 306 standards—are satisfied. 33 U.S.C. 1344(a). Section 402 governs the permitting of discharges of *other* pollutants by providing that, "*[e]xcept as provided in section[]* * * * *[404]*, the Administrator [of EPA] may * * * issue a permit for the discharge of any pollutant," pursu-

ant to Section 402's own set of requirements, including those in Section 306. 33 U.S.C. 1342(a)(1) (emphasis added). The CWA thus makes clear that the specific Section 404 permitting regime, rather than the more general Section 402 permitting regime, is to be used in regulating discharges of dredged or fill material. That division, long accepted by the Corps and EPA, reflects Congress's determination that the two types of discharges should be treated differently in light of their different impacts. See Gov't Br. 19-21, 26-28; Gov't Reply Br. 4, 11-19.

The Court's first question nonetheless assumes that Section 306 effluent limitations apply here and that the proposed tailings discharge would violate those limitations. On that assumption, the Section 404 permits issued by the Corps in this case would have authorized a discharge that violates the CWA. Such permits are "not in accordance with law" (5 U.S.C. 706(2)(A)): indeed, they would run afoul of the very Act the Corps is charged with administering. A court therefore would have authority to set aside the permits.

This Court's decision in *LTV* does not support a different result. In that case, the Second Circuit held that the Pension Benefit Guaranty Corporation (PBGC) had acted in an arbitrary and capricious manner by restoring certain pension plans under Section 4047 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1347, without considering policies reflected in bankruptcy and labor law in addition to ERISA itself. 496 U.S. at 645. This Court reversed. The Court held that, in light of the PBGC's "specific and unambiguous" mandate under ERISA, which directed the PBGC to make decisions consistent with its duties under ERISA and did not require decisions that further

the "public interest" generally, the PBCG's focus on ERISA alone (and not bankruptcy and labor law) was not arbitrary or capricious. *Id.* at 646. The Court explained that agency action should not be set aside simply because the agency had failed "to take explicit account of public policies that derive from federal statutes other than the agency's enabling Act." *Ibid.* The Court observed in that regard that a particular agency may have no expertise in other fields and may be "ill equipped to undertake the difficult task of discerning and applying the 'policies and goals' of those fields." *Ibid.*

Unlike in *LTV*, the Court's question here assumes an actual CWA violation, not simply an agency failure to consider the "policies and goals" that underlie a statute. See *LTV*, 496 U.S. at 645 ("The Court of Appeals did not hold that PBGC's decision *actually conflicted* with any provision in the bankruptcy or labor laws."). Moreover, while the PBGC did not have any obligation to consider the "public interest," see *id.* at 646, the Corps must do so when evaluating permit applications. 33 C.F.R. 320.4(a).

Most significantly, Sections 301 and 306 of the CWA are part and parcel of the very Act under which the Corps issues its Section 404 permitting decisions. Sections 301 and 306 are not provisions of a different statutory regime, let alone of an entirely different field of law, as was the case in *LTV*. See 496 U.S. at 646. Pursuant to its Section 404(b)(1) Guidelines (40 C.F.R. 230.10(b)(2)), for example, the Corps already must determine whether a proposed discharge of fill material would comply with Section 307 toxic effluent limitations. Although the government has argued that the effluent limitations of Sections 301 and 306 are designed to be technology-based standards directed toward discharges

of pollutants other than fill material, the policies behind these Sections sound in protection of the Nation's waters. See 33 U.S.C. 1251(a). The Corps shares in the mission of protecting those waters. The concerns animating the *LTV* decision therefore are not present here.

Although Congress's decision to establish a separate permitting regime for dredged and fill material reflects the distinct concerns implicated by such discharges, the Corps must also consider impacts on water quality in making its permitting decisions. See Gov't Br. 20-21. In particular, the Corps' own regulations require it to evaluate permit applications "for compliance with *applicable* effluent limitations and water quality standards." 33 C.F.R. 320.4(d) (emphasis added). Additionally, the prefatory language of the Section 404(b)(1) Guidelines states that "other laws" may preclude a Section 404 permit. 40 C.F.R. 230.10. That language does not suggest that new-source performance standards issued by EPA pursuant to Section 306 actually apply to discharges of dredged or fill material. See Gov't Reply Br. 8-9. The Guidelines contemplate, however, that the Corps will sometimes take account of statutes other than the CWA itself (*e.g.*, the Endangered Species Act) in determining whether and on what conditions to permit a proposed discharge. See 40 C.F.R. 230.10(a)(4)-(5). Because any Section 404 determination must be consistent with those other environmental laws, the Corps is accustomed to looking beyond its own enabling statutes in determining whether Section 404 permits should be issued. As the Court has held, the Administrative Procedure Act, 5 U.S.C. 706(2)(A), requires an agency to comply not only with the laws it is charged with administering but any law that "circumscribes [the agency's] permissible

action." *FCC* v. *NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 300, 304 (2003).

This is not to say that the Corps, in deciding whether to issue a Section 404 permit for a proposed discharge of fill material, must consider *every* possible legal objection to the permit applicant's proposed course of conduct. The Corps would not, for example, seek to determine whether the applicant could be expected to conduct the filling operation in compliance with applicable minimum-wage and other employment laws. And if the recipient of a Section 404 permit were later found to have violated such laws in carrying out the filling activities, that determination would provide no basis for declaring the Corps' permitting decision to be unlawful. But while the Corps in reviewing Section 404 permit applications does not purport to assess the applicant's compliance with all applicable provisions of law, it does broadly consider the anticipated *environmental* consequences of the proposed discharge.

The contrary conclusion—that a Corps Section 404 permit could not be set aside even if the discharge that it authorized was found to violate Section 306—would have anomalous consequences. Although a Section 404 permittee whose discharges comply with the terms of its permit is deemed to be in compliance with Sections 301, 307, and 403 of the CWA, see 33 U.S.C. 1344(p), and is thus immune from any enforcement action based on alleged violations of those provisions, that immunity does not extend to alleged violations of Section 306. See Gov't Br. 22 n.5; Gov't Reply Br. 9-10. If the permit were not subject to invalidation for failure to incorporate Section 306 standards that this Court had held to apply to dischargers of fill material, then a discharger could be subject to a citizen suit or an EPA enforcement action—and

be in violation of the CWA—despite having received and complied with a valid CWA permit. See 33 U.S.C. 1319, 1365. That would be contrary to the purpose of the Act's immunity provisions, which is to protect the reliance interests of dischargers who seek and obtain CWA permits from the appropriate agency and conform their conduct to the terms of the permit.

In a related vein, if this Court were to hold that Section 306 performance standards apply to discharges of fill material, but that the Corps need not consider those standards in determining whether Section 404 permits should be issued, the Court's decision would create a significant gap in the permitting regime. As we explain in Part 2, *infra*, EPA lacks authority to issue Section 402 permits for discharges of fill material. If the Corps in administering the Section 404 program declined to consider performance standards that this Court had held to apply to fill discharges, then *no* federal agency would be in a position to determine whether a particular proposed fill discharge complies with an applicable CWA requirement. The existence of such a gap would be fundamentally at odds with the basic design of the Act, which establishes CWA permits as the principal mode of compliance in order to ensure that the legality of a proposed discharge is assessed *before* the discharge occurs.

b. Even accepting the premise of the Court's question, however, a court would not be authorized to set aside the Forest Service ROD. The ROD does not purport to authorize the proposed fill discharges into the Lower Slate Lake impoundment, but rather makes the Forest Service's approval contingent on the issuance of Section 404 permits by the Corps. The ROD also authorizes actions independent of the proposed discharges based on criteria outside the CWA. Thus, any invalidity

of the Section 404 permits arising from the hypothetical applicability of Section 306 standards would not render the ROD invalid.

The Forest Service approved a plan of operations submitted by the mining companies for activities associated with the Kensington mine project that fall under Forest Service jurisdiction (*i.e.*, on National Forest System lands). J.A. 207a-248a; see Gov't Br. 6-9 & n.3. Based on the Forest Service's analysis of the environmental impact statements, Forest Plan guidelines, and other sources of law, the ROD selects an alternative (Alternative D) that includes as one component the use of Lower Slate Lake as a tailings storage facility for the proposed discharges. J.A. 211a-212a, 215a-217a, 230a-237a. The ROD makes clear, however, that valid permits must be obtained from other regulatory agencies —including a Section 404 permit from the Corps— before the project can proceed. See J.A. 208a-209a ("Implementation of my decision to select an alternative is subject to the completion of those necessary permit processes by the other federal, state, and local authorities."). The ROD also includes components that authorize other activities, such as the upgrading of access roads and bridges to accommodate mine traffic and the construction of a tunnel to connect the mine with ore-processing facilities. J.A. 213a. The ROD further approves disposal of 40% of the tailings as backfill into abandoned mine workings—an activity that does not require a CWA permit because it does not involve discharges into "waters" protected by the Act. *Ibid.*

Pursuant to its Organic Administration Act of 1897, ch. 2, 30 Stat. 34-36, the Forest Service regulates mining on National Forest System Lands. See 16 U.S.C. 551. Persons entering the forest reserves for the purposes of

prospecting, locating, and developing mineral resources "must comply with the rules and regulations covering such National Forests." 16 U.S.C. 478. Forest Service regulations implementing the Organic Act, found at 36 C.F.R. 228.1 *et seq.*, set forth the rules and procedures "through which use of the surface of National Forest System lands in connection with operations authorized under the United States mining laws * * * shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. 228.1.

Those regulations address the likely impact of proposed activities on surface resources, based on a variety of criteria. 36 C.F.R. 228.4. Although the regulations also require operators to comply with applicable federal and State water quality standards (36 C.F.R. 228.8), the EPA and the Corps (rather than the Forest Service) possess the expertise and authority to address issues under the CWA. When assessing a mining company's plan of operations and determining whether proposed activities will adversely impact the forest surface, the Forest Service therefore does not (and should not be required to) conduct its own analysis of Sections 301 and 306 to determine whether any proposed discharges into "waters of the United States" would comply with the CWA. Cf. *LTV*, 496 U.S. at 646-647.

Instead, the Forest Service ROD makes clear that Coeur's entitlement to discharge fill material into protected waters within the National Forest System is contingent on the issuance *by the Corps* of Section 404 permits authorizing the discharges. Based on the Forest Service's application of its own regulatory criteria, the ROD authorizes other activities that are necessary to the overall mining operation but that do not require

CWA permits because they do not involve discharges into "waters of the United States." Thus, if this Court were to hold that Section 306 performance standards apply to and prohibit the proposed fill discharges at issue in this case, that holding would render the Corps' Section 404 permit invalid, but it would not cast doubt on the legality of any decision that the Forest Service made or was required to make. Accordingly, even if Section 306 performance standards were held to apply to discharges of fill material, a court would not be authorized to set aside the ROD.

2. If A Discharge Is Subject To An EPA Effluent Limitation And Also Falls Within The Agencies' Definition Of The Term "Fill Material," The Discharger May Not Obtain Permits Under Both Sections 402 And 404 Of The CWA

a. Throughout this litigation, all parties, as well as the courts below, have agreed that the proposed discharge is governed by either Section 402 or Section 404, but not both. See, *e.g.*, SEACC C.A. Br. 24 ("The Act provides that a single discharge will be governed by either section 402 or section 404, but not both."); 07-984 Pet. App. 18a (Court of appeals concludes that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation."); SEACC Br. in Opp. 20 ("[O]nly one permitting program is applicable to any given discharge."); Gov't Br. 24 (framing inquiry as "*which* permitting scheme applies"); Coeur Br. 24 ("Section 402 and Section 404 are mutually exclusive permitting schemes."); Alaska Br. 27 ("The exception for Section 404 in Section 402 would be meaningless if EPA could issue a Section 402 permit for a discharge that

meets the criteria of Section 404."); SEACC Br. 21 ("[D]ischarges from sources subject to performance standards must be permitted, if at all, under section 402."). At oral argument before this Court, in response to direct questioning on the issue, respondent SEACC disavowed any argument that a discharger may or must obtain both a Section 402 and a Section 404 permit for the type of discharge at issue in this case. See Oral Arg. Tr. 27, 35-37.

The parties' agreement reflects a sound understanding of the CWA permitting regime. The text and structure of the Act make clear that a discharger may not (and *a fortiori* is not required to) obtain both a Section 402 and a Section 404 permit for a particular discharge.[1] As explained in our merits briefing (Gov't Br. 18-19; Gov't Reply Br. 4-5), Section 402, by its plain terms, is applicable only where Section 404 is not. See 33 U.S.C. 1342(a) ("Except as provided in section [318 and 404], the Administrator may * * * issue a permit for the discharge of any pollutant."). The CWA and its regulatory scheme thus establish two mutually exclusive permitting regimes—as both agencies charged with administering the Act agree. See, *e.g.*, J.A. 83a (Corps/EPA Response to Comments: "If a specific discharge is regulated under Section 402, it would not be regulated under Section 404, and vice versa.").

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[1] If two distinct substances were discharged from a single point source at different points in time, and one of those substances fell within the regulatory definition of "fill material" while the other did not, the discharger would be required to obtain both a Section 404 and a Section 402 permit. That possibility does not logically suggest, however, that a discharger may or must obtain both types of permits *for a particular discharge*.

b. The remaining question is which permitting regime—Section 402 or Section 404—governs in the situation posited by the Court, where a performance standard issued by EPA pursuant to Section 306 is held to apply to a discharge of fill material. The conclusion that the Section 404 permitting scheme would apply to such a discharge follows from the same statutory argument advanced by the government in its prior briefs in this case. See Gov't Br. 18-19, 22-23; Gov't Reply Br. 4-5. Section 404 governs the discharge of dredged or fill material, and Section 402 governs the discharge of *other* pollutants. Compare 33 U.S.C. 1344(a), with 33 U.S.C. 1342(a). Accordingly, identification of the applicable permitting scheme (and of the appropriate permitting agency) turns solely on whether or not the discharge constitutes a discharge of "dredged or fill material." If it is, the discharge is subject (only) to the Corps' Section 404 permitting regime.[2] If it is not, the discharge is subject (only) to EPA's Section 402 permitting regime. As explained in our prior briefs (Gov't Br. 26-37; Gov't Reply Br. 11-21), that dichotomy is reinforced by longstanding administrative interpretations by the agencies. See, *e.g.*, 40 C.F.R. 125.4(d) (1973) (The following do not require an NPDES permit: * * * Dredged or fill material discharged into navigable waters.") (now codified as amended at 40 C.F.R. 122.3(b)); 51 Fed. Reg. 8871 (1986) ("Discharges listed in the Corps' definition of 'discharge of fill material' * * * remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges."); 67 Fed. Reg. 31,135 (2002) ("EPA has never

[2] As noted in our merits briefing (Gov't Br. 4), EPA retains an important role in the Section 404 permitting process through the potential exercise of its veto power under 33 U.S.C. 1344(c).

sought to regulate fill material under effluent guidelines.").

That mode of analysis would be no less valid if this Court determines that Section 306 performance standards apply to discharges of fill material. As explained above, the determination of which permitting scheme applies (*i.e.*, Section 402 or Section 404) depends entirely on whether the relevant pollutant is "dredged or fill material"—not on whether the discharge may also fall within the scope of an EPA effluent limitation. See Gov't Reply Br. 20 ("Under the plain language of Sections 402 and 404, * * * identification of a discharge as 'fill material' does establish that the Corps rather than the EPA is the appropriate permitting agency."). Under Question 2, therefore, the hypothetical applicability of an EPA effluent limitation does not alter the conclusion that a discharge of fill material must be regulated under Section 404.

For the foregoing reasons, if this Court were to hold that Section 306 performance standards apply to discharges of fill material, the authority and responsibility to determine whether particular proposed fill discharges comply with Section 306 standards would rest with the Corps under Section 404 rather than with EPA under Section 402. Implementation of such a regime, however, would pose significant practical problems. First, the Corps has no experience with Section 306 standards because those standards are developed by EPA and both agencies have consistently viewed them as inapplicable to discharges of fill material. A decision holding those standards to apply to fill discharges would thus impose significant new responsibilities upon the Corps.

Second, even if the Corps concluded that a particular proposed discharge complied with an applicable Section

306 performance standard, and issued a Section 404 permit based on that determination, a discharger who complied with the permit would be subject to potential liability in a citizen suit if a court disagreed with the Corps' conclusion and found that the performance standard was violated. That is because Section 404(p) confers immunity only for enforcement actions premised on violations of Section 301, 307, and 403—not Section 306. 33 U.S.C. 1344(p); see pp. 7-8, *supra*. That anomalous result—whereby a party is subject to liability notwithstanding possession of and compliance with a facially valid CWA permit that was premised on the appropriate agency's consideration of all applicable legal requirements—provides further reason to reject the premise that Section 306 standards apply to fill discharges. See Gov't Br. 22 n.5; Gov't Reply Br. 9-10.

If this Court nevertheless were to hold that EPA effluent limitations apply to discharges of fill material, and therefore must be considered and incorporated by the Corps into Section 404 permits, its decision would alter fundamentally the agencies' existing approach to implementation of the CWA. In that event, the agencies might seek to amend other aspects of the regulatory framework in order to address the anomalies described above. The agencies might reconsider the current regulatory definition of the term "fill material" and, in particular, their previous decision not to adopt an exception for discharges covered by EPA effluent limitations. See 65 Fed. Reg. 21,299 (2000); see also Gov't Reply Br. 19-20.[3] Or they might fashion some process by which the

[3] The principle that permits for discharges of "dredged or fill material" are issued by the Corps under Section 404, while permits for other pollutant discharges are issued by EPA under Section 402, is unambiguously stated in the CWA itself and could not be altered through agen-

Corps consults with the EPA for the purpose of determining the impact on its permitting decision of any relevant EPA effluent limitations. In any event, a decision by this Court holding that Section 306 effluent limitations are applicable to fill discharges would likely trigger significant regulatory changes to the current permitting regime.[4]

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cy regulations. The agencies' *definitions* of "fill material," however, have changed over time, and the current regulatory definition could be amended.

[4] If this Court holds that Section 306 standards apply to discharges of fill material, its identification of the appropriate permitting agency would not affect the proper disposition of this case. The Section 306 standard at issue provides, in relevant part, that "there shall be *no* discharge of process wastewater to navigable waters from mills that use the froth-flotation process." 40 C.F.R. 440.104(b)(1) (emphasis added). If that standard were deemed applicable to the tailings slurry for which the challenged Section 404 permits were issued, neither the Corps nor EPA would issue a permit for the discharges as currently proposed. Accordingly, rather than decide which permitting regime applies, this Court could simply vacate the Section 404 permits and remand to allow the agencies to make that decision if the Court holds that Section 306 standards apply to discharges of fill material.

CONCLUSION

If the Court holds that discharges of fill material are subject to Section 306 standards, a court could set aside the Section 404 permits issued by the Corps, but not the Forest Service ROD, as "not in accordance with law." A discharger may not obtain both a Section 402 and Section 404 permit for a proposed discharge of fill material; rather, the Corps possesses sole permitting authority under Section 404 even if it must apply an EPA effluent limitation.

Respectfully submitted.

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